S. Hrg. 99-1078

POSSIBLE LEGISLATIVE RESPONSES TO BOWSHER v. SYNAR

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

JULY 23, 1986

Printed for the use of the
Committee on Governmental Affairs

S401-31

U.S. GOVERNMENT PRINTING OFFICE
66-831 O WASHINGTON : 1987

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

COMMITTEE ON GOVERNMENTAL AFFAIRS

WILLIAM V. ROTH, Jr., Delaware, *Chairman*

TED STEVENS, Alaska
CHARLES McC. MATHIAS, Jr., Maryland
WILLIAM S. COHEN, Maine
DAVE DURENBERGER, Minnesota
WARREN B. RUDMAN, New Hampshire
THAD COCHRAN, Mississippi

THOMAS F. EAGLETON, Missouri
LAWTON CHILES, Florida
SAM NUNN, Georgia
JOHN GLENN, Ohio
CARL LEVIN, Michigan
ALBERT GORE, Jr., Tennessee

Franklin G. Polk, *Chief Counsel and Staff Director*
Robert S. Gilmour, *Professional Staff Member*
Margaret P. Crenshaw, *Minority Staff Director*
Terry Jolly, *Chief Clerk*

CONTENTS

Page

Opening statements:
- Senator Roth 1
- Senator Cohen 2
- Senator Rudman 3
- Senator Cochran 13
- Senator Chiles 14
- Senator Nunn 37
- Senator Glenn 40
- Senator Durenberger 42

WITNESSES

WEDNESDAY, JULY 23, 1986

Hon. Pete V. Domenici, U.S. Senator from the State of New Mexico 16

Hon. Phil Gramm, U.S. Senator from the State of Texas 25

Hon. Ernest F. Hollings, U.S. Senator from the State of South Carolina 25

Charles A. Bowsher, Comptroller General of the United States, accompanied by Milton J. Socolar, special assistant to the Comptroller General 43

Elmer B. Staats, former Comptroller General of the United States 54

James C. Miller III, Director of the Office of Management and Budget 61

Ernest Gellhorn, managing partner, Jones, Day, Reavis & Pogue, Washington, DC, and former dean, Case Western Reserve Law School, Cleveland, OH, and Prof. Cass R. Sunstein, University of Chicago Law School, Chicago, IL 79

ALPHABETICAL LIST OF WITNESSES

Bowsher, Charles A.:
- Testimony 43
- Prepared statement 87

Domenici, Hon. Pete V.:
- Testimony 16
- Prepared statement 24

Gellhorn, Ernest:
- Testimony 79
- Prepared statement with an attachment 107

Gramm, Hon. Phil: Testimony 25

Hollings, Hon. Ernest F.: Testimony 25

Miller, James C., III:
- Testimony 61
- Prepared statement 103

Socolar, Milton J.: Testimony 43

Staats, Elmer B.:
- Testimony 54
- Prepared statement 95

Sunstein, Cass R.:
- Testimony 79
- Prepared statement 132

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Page

Comptroller General authorities potentially affected by *Bowsher* vs. *Synar* 5
Letter to Senator Levin from James C. Miller III, Director, OMB, Aug. 11, 1986 . 68
Letter to Chairman Roth from Rudolph G. Penner, Director, Congressional Budget Office, Aug. 21, 1986 70
Prepared statements of witnesses........ 87
Gramm-Rudman II Option with attachments........ 151
Representative Mike Synar, et al., plaintiffs v. United States of America, defendant; National Treasury Employees Union, plaintiff v. United States of America, defendant; U.S. District Court for the District of Columbia.............. 161
Bowsher, Comptroller General of the United States v. *Synar, Member of Congress, et al.;* Supreme Court of the United States........ 213
Memorandum to Chuck Konigsberg, Senate Budget Committee, from Congressional Research Service, Amerian Law Division, dated June 3, 1986............... 290

POSSIBLE LEGISLATIVE RESPONSES TO BOWSHER v. SYNAR

WEDNESDAY, JULY 23, 1986

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The committee met at 9:31 a.m. in room SD-342, Dirksen Senate Office Building, Hon. William V. Roth, Jr. (chairman of the committee) presiding.

Present: Senators Roth, Stevens, Cohen, Durenberger, Rudman, Cochran, Eagleton, Chiles, Nunn, Glenn, and Levin.

OPENING STATEMENT OF CHAIRMAN ROTH

Chairman ROTH. The committee will please be in order.

Last year, in recognition of chronic frustration in its deficit reduction efforts, Congress enacted the Gramm-Rudman-Hollings legislation. Its purpose was to set in place an automatic deficit reduction mechanism that would make sure the necessary cuts would be made if Congress was itself unable to make them.

I supported this concept initially but opposed the legislation ultimately because it did not treat all programs in an evenhanded manner. Because of the political bias in the deficit reduction mechanism, I felt constrained to vote against the legislation.

Under this legislation, the Comptroller General, guided by congressional mandates, reported to the President on the deficit reduction to be made. The Supreme Court has found the Comptroller's role in executing this law unconstitutional because Congress, by another law, has the power to remove him.

My primary purpose in holding these hearings is to assure that in any attempt to repair the automatic deficit reduction mechanism, the essential mission of the Comptroller General is not undermined. Each year, the General Accounting Office saves the taxpayers billions of dollars by exposing fraud, waste, and inefficiency in executive and independent agencies. It would indeed be a cruel irony if, in the guise of preserving the deficit reduction mechanism, we lost this money-saving Agency.

And this Agency would be lost, in my opinion, if it were transferred to the executive branch in order to carry out its role under Gramm-Rudman-Hollings.

I will not sit idly by if any attempt is made to subjugate the Comptroller and over 5,000 employees at GAO to the executive branch in which GAO sits in daily judgment.

My purpose here is not merely to oppose. The Supreme Court decision raises serious questions about many GAO functions, from its litigation authority to police deferrals and rescissions under the Budget Act, to its bid for protest responsibilities under the Competition in Contracting Act.

To the extent we can, we must also explore how these questions might be resolved. Various solutions have been offered for both the Gramm-Rudman-Hollings question as well as the more general GAO questions. Staff has reduced examples of the basic approaches to writing so that witnesses today might comment on them.

The first would transfer the Comptroller's reporting responsibility under Gramm-Rudman to an existing Executive office, such as the President or the Director of OMB.

The second would transfer those responsibilities to a new executive officer or entity. Such officer might be a newly created director of deficit reduction, and I would point out, and I think it is an important thing to consider, that perhaps the President might be persuaded to appoint one Charles Bowsher to that office. In other words, Charles Bowsher would wear two hats, one as Comptroller General and an independent one as director of deficit reduction.

Or the new entity might be a blue ribbon bipartisan commission. Of course, transferring the Comptroller functions to any of these executive officers or entities would not address the more widespread problems that confront GAO.

The third solution would address those problems, as well. It would merely delete the removal authority of Congress, which the Supreme Court found offensive, and make the Comptroller removable only through the Constitutional process of impeachment and conviction. While this approach has the virtue of addressing the Supreme Court's objection, it does have the vice of inviting further litigation. This risk may be worth it, since the approach would appear to leave the nature of GAO fundamentally unchanged.

The fourth approach, Presidential removal of the Comptroller for various causes, narrow or broad, or Presidential removal at will, I have addressed before. Basically, I am opposed to this general approach and hope that those gathered here today might come to see the wisdom of other solutions.

Before we turn to our distinguished list of witnesses, I will recognize other members of the committee who may wish to make a statement. Senator Cohen?

OPENING STATEMENT OF SENATOR COHEN

Senator COHEN. Just a brief comment, Mr. Chairman. First of all, I was pleased to hear you say it was Gramm-Rudman and Hollings. Now that a portion of the bill has been declared to be unconstitutional, Senator Hollings 'name has resurfaced, and we call upon him to explain the provisions. [Laughter.]

In view of the fact that we have several of our colleagues about to testify, it is unlikely that I will be able to remain long enough to address a couple of questions to Mr. Bowsher. There are a number of functions, as a result of the Supreme Court decision, which have a direct impact upon the GAO's role, and there are many, many functions which they appear to have lost as a result of that particular decision.

One that I am most concerned about is the Competition in Contracting Act. The GAO has been involved in bid protest resolutions for the past 60 years, and 2 years ago, we codified the role of GAO in that Competition in Contracting Act. The third circuit had ruled it to be constitutional under a challenge by the Justice Department. That is now up for rehearing, by petition on the part of the Justice Department.

So I would like, at some point to address several questions to the Comptroller General as to whether or not he sees a distinction in the role of the GAO under the Competition in Contracting Act, and if not, what role he foresees for the GAO in resolving bid protests in the future.

Chairman **Roth**. As I stated, we really have two problems: The immediate question of Gramm-Rudman, which is on a timeframe of immediate importance, but equally, if not more important, is the question of GAO itself, which we do hope to address in some detail today.

Senator Rudman?

OPENING STATEMENT OF SENATOR RUDMAN

Senator **Rudman**. Thank you very much, Mr. Chairman. Mr. Chairman, I have exercised my option to sit up here this morning rather than testify, because I have never had an opportunity to get the last word in when I have been with Senator Gramm. So I am going to ask him some questions this morning.

Mr. Chairman, let me just simply say that your concerns and the concerns of others about the Comptroller General's role certainly reach sympathetic ears, and as the Chairman knows, one of several proposals of the original sponsors of this legislation has been discarded and set aside. The proposal that Senators Gramm and Hollings will talk about this morning, that the three of us will introduce as an amendment to the debt ceiling, will in no way change the function of the Comptroller General. We have discarded that because there was, obviously, very substantive opposition to it. We listened to that opposition.

I have gone through. as has the Comptroller, with a very studious eye toward what has happened to the Comptroller's office, and I will introduce into the record this morning a document which contains approximately seven or eight pages of items which I think the Comptroller and this committee would agree they no longer can enforce. There has been a major change in the enforcement powers of the Comptroller General under this decision, and quite frankly, although the Comptroller still has his audit/investigative functions, I have great fear, as expressed by the chairman in his opening statement, that something ought to be done to preserve the Comptroller's enforcement powers.

Unfortunately, the only way to do that and to give him any Executive power whatsoever is to do what we had originally proposed doing, that is, making the Comptroller removable by the President. It seems to me, Mr. Chairman, that if the Congress is willing to be satisfied with the fact that the Comptroller is going to be an auditor and an investigator and that is all, then I expect that we can live with the Supreme Court case as it is.

But I have always felt that a number of the enforcement powers of the Comptroller were very important. That is a subject for another day and maybe for other people, but I do think it is important that this seven-page list of powers lost to the Comptroller be part of the hearing record, and I know the chairman shares that view.

[The information referred to follows:]

July 22, 1986

COMPTROLLER GENERAL AUTHORITIES POTENTIALLY AFFECTED BY BOWSHER VS. SYNAR

	1.	Claims settlement, generally
31 USC § 3702	a.	The Comptroller General shall settle "all claims of or against the United States."
31 USC § 3711(b)	b.	Only the Comptroller General can compromise a claim arising from an audit exception.
2 USC § 130c	c.	Investigating applications for waiver of claims over $500 for erroneous payments to Vice President, a Senator or senate employee. Such claims may not be waived if Comptroller General takes exception to the account.
31 USC § 3711(b)	d.	Resolves doubtful claims submitted by agencies if not over $20,000 each.
31 USC § 3711(e)	e.	Prescribes claims collection standards jointly with the Attorney General.
31 USC § 3531(b)(2)	f.	The Comptroller General must charge appropriation accounts for losses and damage to United States property attributable to negligence of an official or agent of the agency.
31 USC § 3526(a)	g.	The Comptroller General must supervise the recovery of all debts certified as due to the Government.
	2.	Account Settlement
31 USC § 3526	a.	The Comptroller General shall settle all accounts of the United States Government.
31 USC § 3526(d)	b.	The balance certified by the Comptroller General is conclusive on the executive branch of the Government.
31 USC § 3526(d)	c.	The Comptroller General may change the account within a year after settlement on his own initiative or on the request of an agency head. Any change he makes is also conclusive on the executive branch.
31 USC § 3521(a)	d.	With the consent of the Comptroller General, the head of an agency (required

to conduct an administrative audit of agency accounts before submitting them to the Comptroller General) may waive any part of the audit.

48 USC § 1469

e. The Comptroller General must settle and adjust all disbursement accounts of appropriated funds to support governments of the United States territories.

18 USC § 4126

f. The Comptroller General must settle and adjust all receipts and disbursements from the Federal Prison Industries Fund. No disbursements can be made from the fund without a warrant or certificate of settlement from the Comptroller General.

g. Panama Canal Commission.

22 USC § 3712(c)(2)

(1) Before the Commission may receive an appropriation for any fiscal year, the Comptroller General must certify the accuracy of the Department of Defense's estimates of tolls likely to be collected and amounts likely to be needed.

22 USC § 3712(c)(2) and 3751(a) as amended by Pub. L. No. 98-63

(2) Before funds may be paid to the Republic of Panama, pursuant to Treaty obligations, the Comptroller General shall determine, on the basis of an annual validation audit, whether payments made to the Republic of Panama by the Commission accurately represent excess operating revenues over expenditures. Any overpayment he discloses must be refunded by Panama or offset against other payments due to Panama.

22 USC § 2221(d)

h. Audits under Foreign Assistance Act of 1961, as amended.

The Comptroller General must audit any fund established solely with United States contributions to make grants and loans to international organizations but which is administered by such international organizations pursuant to an agreement with the United States. If the Comptroller General finds that the funds are not being administered in accordance with the agreement, the President is required to modify the agreement to conform to the Comptroller General's findings and recommendations.

31 USC § 1556 i. Comptroller General reports on appropriation accounts. In connection with his general audit authority, the Comptroller General must report on the state of executive agency appropriation accounts, including an appraisal of unpaid obligations. By the 30th day after receiving the report, the agency must carry out what ever actions the report shows are necessary.

3. Advance legal decisions

31 USC § 3529 A disbursing or certifying official or the head of an agency may request an advance legal decision about the propriety of making a proposed payment or certifying a particular voucher for payment. The Comptroller General must issue the decision requested.

31 USC § 3526(b) Such decisions are binding on the Comptroller General if an agency official makes the payment in accordance with our advice when we settle the account at a later time. The statute does not deal with the reverse situation--i.e., when the agency official ignores our advice. We might feel equally bound to take an exception to his account. In other words, we have contended for years that under our account settlement authority, our legal decisions about improper expenditures are equally binding on the executive branch. That is not literally what the statute provides, of course, but we have placed this authority in the probable category, nevertheless.

4. Relief authorities

31 USC § 3527 a. The Comptroller General is the only government official who can relieve a present or former accountable officer from liability for a physical loss of money, or for an illegal, improper, or incorrect payment from his account. Except for physical losses in accounts of disbursing officers in the Armed Services, such determinations are binding on all executive branch agencies.

31 USC § 3527(c) b. The Comptroller General may deny relief if he finds that the head of the agency did not carry out diligently collection action under procedures prescribed by the Comptroller General.

31 USC § 3528(b) c. The Comptroller General may relieve certifying officers from liability for improperly or illegally certifying a voucher for payment, when he finds that certain statutory criteria have been met.

31 USC § 3528(c) d. The Comptroller General may relieve a certifying official from liability for overpayments to common carriers when certain specified conditions are met.

5. Prescribing accounting standards or procedures

31 USC § 1112 (c)(1) & (d) a. The Comptroller General must establish, maintain and publish standard terms and classifications for use in providing fiscal, budget and program information about agency activities. Agencies are required to use the Comptroller General's terms and classifications when they report on their programs to the Congress.

31 USC § 3511 (a) b. The Comptroller General shall prescribe accounting principles, standards, and requirements which the head of each executive agency shall observe.

31 USC § 3512 (e) & (f) c. The Comptroller General is authorized to review, and to approve the accounting systems of each executive agency when he finds they conform to his prescribed principles, standards, and requirements.

31 USC § 3513 (c) d. The Comptroller General shall review, and approve the reporting and accounting system in the Department of the Treasury when he finds that it conforms to his requirements.

31 USC § 3521 (b) e. The Comptroller General may prescribe the maximum amount of a voucher that may be audited under a statistical sampling procedure.

31 USC § 3530 f. The Comptroller General may prescribe regulations to adjust appropriation accounts for a loss of funds attributable to accountable officer negligence.

31 USC § 3522 (a)(1)	g.	Disbursing officials may submit their accounts quarterly unless the Comptroller General decides that the public interest requires more frequent submissions.
22 USC § 283j-1	h.	Inter-American Development Bank. The Comptroller General must prescribe for the Secretary of the Treasury the scope of and the auditing and reporting standards which the Executive Director of the Inter-American Development Bank must follow.
22 USC § 2221(e)	i.	The Comptroller General must prepare auditing and reporting standards in connection with his audits of United Nations and affiliated agencies, International Bank for Reconstruction and Development, Asian Development Bank, and the International Atomic Energy Agency. These standards must be incorporated in any proposed agreement the President makes with these entities.
47 USC § 307 (as amended by Pub. L. No. 98-214)	j.	Corporation for Public Broadcasting. The Corporation may not distribute any funds to National Public Radio unless it can determine that NPR is implementing a system of financial controls and procedures recommended by an independent C.P.A. (which system the Comptroller General has determined complies with generally accepted accounting principles and which reflect prudent management practices).
42 USC § 300x-5 (a)	k.	State audits of community health center grants from HHS must comply with the Comptroller General's standards for audits of government agencies and organizations.
31 USC § 7501 et seq.(new)	l.	State and local assistance programs - must be audited in conformance with the Comptroller General's generally accepted auditing standards.
31 USC § 6723 (a)(1)	m.	State Revenue Sharing programs - must also be audited in conformance with the Comptroller General's generally accepted auditing standards.

31 USC § 3523 (c)(1) n. Records retention - the Comptroller General may require agency records to be retained under conditions and for a period of not more than 10 years (unless the Comptroller General and the head of the agency agree to a longer period)

6. Participation in decision-making as member of independent boards and commissions

Current memberships include: Railroad Accounting Principles Board (49 USC 11161 et seq.); U.S. Railway Association Board of Directors (45 USC 711); Technology Assessment Advisory Council (2 USC 476); and a board to arbitrate disputes about price, quality, suitability etc. of prison-made products, decisions of which are binding on Federal agencies required to buy the products. (18 USC 4124).

7. Davis-Bacon Act Determinations

40 USC §276a-2 The Comptroller General is required to make Davis-Bacon Act determinations about a contractor's liability for failing to pay laborers and mechanics required level of wages, followed by decision to debar the contractor from participating in further Government contracts for a period of 3 years.

8. Countersigning Warrants

31 USC §3323 The Comptroller General is required to countersign warrants before the Secretary of the Treasury may pay the various agencies their share of appropriated funds.

9. Reasonable Price Determination

DOD Authorization Act, Pub. L. No. 99-145 The Comptroller General must determine the reasonable price of uranium tetrafluoride (used to produce conventional ammunition) in order to enable the Secretary of the Army to make required certifications to the Congress, which is a prerequisite to providing the uranium to contractors from stockpile materials.

10. Impoundment Suits

2 USC § 687 The Comptroller General is "expressly empowered" to bring a civil action in the United States

District Court for D.C. against any department, agency, or officer to require him to make budget authority available for obligation which, in his view, should not have been impounded.

11. Verification Examinations of Energy Information

42 USC § 6382 (a)(1) The Comptroller General has authority to issue subpoenas to produce books and records, compel attendance of witnessess, and required written answers to his interrogatories in connection with his duty to conduct verification examinations of information furnished about energy resources.

The Comptroller General may assess civil penalties of up to $10,000 for each violation of an order to produce information.

The Comptroller General has authority to obtain enforcement of his subpoenas or order in a United States District Court.

12. Certifications of judgments, awards, and compromises for payment from the judgment fund.

31 USC Usually this is ministerial, but the Comptroller General may refuse to so certify if he finds that the requirements of the law, both as to the underlying judgment and/or a claim for interest, have not been met.

13. Procurement Protest System under Competition in Contracting Act.

31 USC § 3551 et seq.

a. Protests by contractors alleging a violation of procurement statutes or regulations shall be decided by the Comptroller General within specified time limits. The decision may contain recommendations to the agency, but they are not binding. Nevertheless, the agency is not allowed to proceed with making its award until the Comptroller General's decision has been issued unless it makes a written finding that "urgent and compelling" circumstances will not permit the delay. It is this "waiting" requirement that has been challenged in Ameron, Inc. v. U.S. Army Corps of Engineers et al., in the Third Circuit Court of Appeals on constitutional grounds and is awaiting rehearing by the full court, in the light of Bowsher v. Synar.

31 USC § 3554(c) b. The Comptroller General may determine that the solicitation for a contract or proposed award doesn't comply with a statute or regulation and declare the interested party to be entitled to the costs of filing and pursuing the protest, including attorney fees, and bid and proposal preparation costs. Federal agencies are required to pay such monetary awards promptly out of available funds.

14. Form and content of information provided to Congress

31 USC §1113 (b) The Comptroller General can require OMB and heads of executive agencies to provide to the Congress fiscal, budget, and program information, including summary tables and whatever related information the Comptroller General thinks is necessary.

Chairman ROTH. Let me say I do have the same concern, and we do expect to delve in some manner today into those issues. I would say, though that I don't think there is total agreement as to what the impact of the Supreme Court decision is on each of these issues. I think that is one of the questions that we will be wanting to investigate with great care.

But I certainly strongly agree that this is a key problem that is going to have to be dealt with by this committee.

Senator Cochran?

OPENING STATEMENT OF SENATOR COCHRAN

Senator COCHRAN. Thank you, Mr. Chairman. I look forward to hearing the testimony of witnesses today as we try to make sure that our efforts to put teeth in the budget balancing process are consistent with the constitutional requirements. I think we can accomplish this task, and I think it is encouraging that the Congress quickly ratified the reductions that were made in spending of about $11.7 billion for fiscal year 1986. That shows very clearly the commitment of the Congress to deficit reduction and working our way toward a balanced budget.

I think the Congress is going to be receptive to doing whatever has to be done to make sure that the other parts of the new rules and the new laws under the Gramm-Rudman-Hollings provisions are kept in force and effect.

Let me say that one other thing worries me considerably. We should find a way to expedite the procedures and the process by which we arrive at a budget resolution in the Congress. I think it is terrible that we establish target dates for action and then abandon that timetable. This really disrupts planning at the local and State level and throughout the Federal Government in a very unfortunate way.

I know that, in a case that I am personally familiar with because my father is a retired superintendent of schools in Mississippi, the State began getting some Federal assistance for some of our school districts so that additional teachers could be hired and curricular could be developed to help disadvantaged students. But the school districts wouldn't know until the last minute, right before school started, how much money they were going to get. That is happening today throughout the country. This is the failure of the Congress to give clear signals as to how much the appropriations for all these accounts will be for the next fiscal year. We get to the end of a fiscal year, and we haven't appropriated money to begin the new fiscal year on October 1.

I think we need to do something about that, if it can be done, as we make changes in the law here. I think we ought to try to expedite the process so that we can appropriate on time and so that agree on a resolution on time. I think one way to do this is to create a joint committee on the budget. That is provided for, I know, as one of the fallback provisions in the Gramm-Rudman-Hollings law. Let's make that a permanent committee.

Why have a resolutions approved by each house and then a conference that seems to take forever? Let's have a joint committee report a budget resolution that is considered in each House rather than two committees working separately. I think that would help. I hope the witnesses will consider that and the committee will consider that.

Thank you, Mr. Chairman.

Chairman Roth. Thank you, Senator Cochran.

Senator Chiles?

OPENING STATEMENT OF SENATOR CHILES

Senator Chiles. Mr. Chairman, I believe I am the only member of this committee who serves on the Budget Committee, so I have got a double-barreled desire to see us fix this and fix the Gramm-Rudman-Hollings law. At the same time, I think it is critical that the changes that we make are well balanced and safeguard the separation of powers.

The problem is I don't believe that we can do all these things right now at the same time. Mr. Chairman, I think you stated it. You think it would be a serious mistake if we took away the independent status of the General Accounting Office, and I certainly agree.

I think it is essential that we keep GAO both strong and independent. The essential question is: How can we do this and at the same time preserve the clout of the automatic sequester in the aftermath of the Supreme Court ruling?

The Court's ruling not only altered the key provisions of Gramm-Rudman-Hollings; it triggers the basic changes in the standing of the General Accounting Office. The staff of the Comptroller General has provided us with an 8-page outline that lists some 17 different functions of GAO that is affected by the Supreme Court decision. None of those changes have anything to do with Gramm-Rudman-Hollings. They are separate duties, but they are important duties, and they are influenced by the outcome of the case.

So when you add up all the changes, it is clear that Congress has a duty to make adjustments in the operation of GAO. The Agency may not be broken, but it is certainly a different place right now, and it is going to need some fresh guidance from the Congress. Obviously, that is going to be a complex job, and it can't be done in the short timeframe that we have before us as the Senate begins consideration of the debt limit extension.

Without a thorough review, I don't think it is possible for Congress to reach a consensus on either the substance of necessary changes or to build a political consensus on how we should make those changes. So I think we are left with this immediate situation.

The only way to maintain the automatic deficit reduction provisions in Gramm-Rudman-Hollings is to allow the Office of Management and Budget to draw the final executive order and sequester rather than GAO.

I think at the same time, when we say that, I think we all realize that that implies a tremendous shift of power to the executive branch. GAO is independent; OMB is not. OMB does the bidding of the White House, and that is not true because right now it is a Republican White House; it has been true when it is a Democratic White House. It is just the way that Agency is constituted, and it is going to be that way. They are going to follow the bidding of their President's party.

What is especially disturbing is that GAO is distant and remote from the legislative process and does not respond to constituent needs expressed in the Congress. It is a gathering place of skilled bureaucrats with analytical skills. But regardless of those skills, they are still bureaucrats, and they are still very insulated from front line discussions between Members of Congress and the people who send us here to deal with the very practical problems.

Beyond these realities, the shift of such authority to OMB, I think, also could be criticized as an improper delegation of power. The Supreme Court didn't discuss that in the latest case, but if OMB is given such authority of unrestricted flexibility, we could face a new legal challenge on the basis of that delegation of power.

So with all those things in mind, I would propose a two-track approach to the current situation. For the short term, I think it is clear that Congress has to act before August 15 if we want to preserve the automatic provisions of Gramm-Rudman-Hollings, and it seems to me the best course would be to put the authority for preparing executive order and sequestering temporarily in the hands of OMB. I don't think we should put it there for more than 1 year, so that we have an opportunity to look at it again; so that we have an opportunity to see whether there is a better way to do that.

So the short-term measure would produce two benefits. It would get us through the uncertain weeks ahead that we have to deal with the possibility of dealing with the sequester and preserving Gramm-Rudman-Hollings, and it allows us to carefully monitor OMB's performance and to watch for abuses and to gain some insight into what additional changes might be necessary.

For the long run, then, Congress will have to consider whether we can restore GAO as an impartial arbiter under Gramm-Rudman-Hollings. If we can't, then we will have to look to decide whether some independent agency or perhaps a new unit will have to be created to do the job.

What we are talking about here today is important, but the larger question is eliminating the Federal deficit, and that is the whole reason behind Gramm-Rudman-Hollings.

So the public will let us haggle over the law, but I don't think their patience is unlimited in regard to the deficit. I have heard it argued over and over again that Gramm-Rudman-Hollings is little more than a sophisticated smoke screen for Congress and the President to hide behind in an attempt to sidestep the hardship of deficit reduction.

I disagree. I think it was and does remain a serious discipline that Congress has imposed upon itself and the White House to establish ground rules which we could violate only with the most serious of consequences, and I think it is just as true that the consequences could be equally serious if we saved Gramm-Rudman-Hollings by giving away the congressional responsibility for budget discipline.

So what we do about the law now should be an interim response, and we should give ourselves time to deal clearly with the constitutional issues without wasting time on the deficit.

Chairman ROTH. Thank you, Senator Chiles. We are pleased to have as our first witness our good friend and colleague Pete Domenici, who, of course, serves as chairman of the Senate Budget Committee. I think Senator Domenici, together with Senator Chiles, are to be congratulated for last week having gotten through the Senate, as the first exercise, the so-called backup fallback provision of Gramm-Rudman-Hollings. It was accomplished smoothly, almost painlessly. I hope we will learn this morning from Mr. Domenici how the process works and how we can expect it to work in the future.

Senator Domenici, welcome.

TESTIMONY OF HON. PETE V. DOMENICI, U.S. SENATOR FROM THE STATE OF NEW MEXICO

Senator DOMENICI. Thank you very much, Mr. Chairman, members of the committee.

First of all, Mr. Chairman, I hope I don't burden this committee for very long. I am in the same position as many of you: I am supposed to be in three other committees, and I have to go to one because we are marking up the highway bill. So I am going to try to be brief. I would ask that my prepared remarks be made a part of the record at this point.

Chairman ROTH. Without objection.

Senator DOMENICI. Mr. Chairman, let me address a few points that have been raised by the members of your committee as they discussed this issue, for starters. The distinguished Senator from Mississippi raised the issue of the nature of the Budget Committee, and let me say to him and to you, I believe this Congress wants to do something that will really help the fiscal hangups that are here, and they are dramatic. The people of this country can't possibly know what we are doing. Continuing resolutions confused with budget resolutions confused with appropriation bills, ad naseum.

If there is one thing we ought to try to do, it is to try to have something simple enough for the people of this country to hold us responsible, and to seriously look at reforming the budget process. Let me suggest to my friend, one time about 1½ years ago before the Rules Committee of the U.S. House, without any prepared text, I had a lot of fancy ideas about the budget process. I said maybe we ought to have a joint committee and maybe it ought to meet every year and represent both bodies.

But let me suggest that I changed my mind, but only in this respect: If we want to do that, we ought to reform the appropriations process dramatically. There is no reason in the world under the Constitution that we have to appropriate every year. It would seem to me if we want to really send some signals to our members and to our people that we are organized in a way which is calculated to get the business done, we ought to have one budget resolution that is good for 2 years that can be modified simply about every 6 months. We ought to do away with annual appropriations and have them once every 2 years. We ought to let Members of Congress spend a year doing other business and a year doing the business of the fiscal policy of the Nation.

I have checked and it is my considered belief that if you look at every appropriation bill, that about 90 percent is a repetition of the previous year's work. I see no reason why we couldn't do it all on a 2-year cycle. There is a real difficulty with a joint budget committee, probably more difficulty with the House than with the Senate. It would have to have some real power, and it would meet early on and decide for the Congress of the United States a joint budget.

In a sense, I say to my friend from Mississippi, it would kind of become the up-front conference. It would do most of the work of conferees, because you would expect them to iron out the difficulties and differences.

Let me suggest, however, that I don't think the House, the way it has been handling the appropriations process, tends to want to be as restrictive as the U.S. Senate, and we are going to run into some serious problems this year in that regard.

Now, let me leave that quickly and suggest in my prepared remarks, Mr. Chairman, I address the issue that you just raised: Will the fallback provision work in the future? I am here because I think we have to fix the statute. I believe we need something like the process that was thrown out by the Supreme Court. I know there is a Gramm-Rudman II before us. I hope we never have to use it again. But I do believe the chance of ever having to use the trigger or pull the trigger is significantly related to the assurance that there will be a sequester. And consequently, I believe you have to find some mechanism, be it the Gramm-Rudman II, the general outlines that Senator Chiles has given here that you might not want to do it for 5 years right now but find a way to do it for one year and look again, but in some way, if you want the discipline, you have got to have that, in my opinion.

I don't perceive it to be Congress trying to escape its responsibility. Quite to the contrary. I believe it is a democratic way of saying it is tough for Congress and the President to do it, and if we can vote that on ourselves, I think it is saying to us, we must do it, and it is giving us the extra push to do what has become almost impossible because of gridlock between the House, the Senate and the President.

With reference to the proposal of the distinguished original sponsors now called Gramm-Rudman-Hollings II, I think it is easy to understand. When it first appeared in print, it seemed kind of complicated, but it is very simple in that there are no operative words, legislative words, that are significantly changed with reference to responsibilities.

The GAO, which is now out of the loop as a permanent submitter of the order, does just what it did in the past; the same legislative mandates are on that body to take a look at what OMB and CBO did, and then they are to give it due regard and to explain any changes that they make.

Now, if we stopped there, we can take a look back and see how it worked the first time, and it seems to me that the Comptroller General was very practical. The Comptroller General did not try, exercising due regard in his explanation powers, to undo those things that the other two agreed upon. It settled a few disputes, made a few technical changes, and I believe that model can then be carried the next step. The next step is this: of what they propose, leave that intact and then put OMB back in the loop and say, when the Comptroller General is finished, he sends his work to the OMB, and then they, again, have the same operative words. They are supposed to affirm it, giving due regard to it, and if they want to make changes, they are to explain them.

If the Congress believes that the practical effect of this is that they will conduct themselves in much the same way that the Comptroller General did, then it seems to me there need be little fear, and perhaps that is a good approach. But I believe it behooves me to say that truthfully, the Comptroller General didn't have to behave that way. The Comptroller General could have changed things dramatically and explained them, and that would have been the operative document going to the President of the United States to effect the across-the-board sequester.

So I think the rub comes in, Mr. Chairman and members of the committee, in that there are some who will say it is apt not to work the same way because the OMB does, indeed, if you want to give it its broadest capability and powers, it has the potential, the prospect, the power, whatever word you want to use, to substantially modify, so long as they have given due regard and give an explanation.

I, myself, believe that it will probably work, even as they have proposed it. I believe the practical effects of dramatic departures from what had previously been agreed to by OMB and CBO would have a very, very inhibiting effect on their conduct.

They will just have finished doing it one way, and then if they can turn right around and, under the assumptions I have given you of maximizing their capability, undo it all, it would seem to me that there would be a drastic response on the part of Congress and the American people. It would be an ordinate response to an inordinate act on the part of OMB.

So I think there are some pressures to keep them in line. But I must tell you that the argument will be made that they could, indeed, dramatically change it, as I see it, interpreting it, and thus put on their shoulders and in their executive capacity as representative of the President some very significant powers that are not there now.

If there is somebody that has a way to constitutionally fix that and still leave them in the loop, I assume you are willing to listen as a committee, and I assume the U.S. Senate will listen on the floor in the next 2 to 7 days, when this issue is presented.

Let me say, I don't believe, however, to distinguish this power that they may exercise, giving due regard to the report they are looking at and explaining it, I don't believe that power significantly changes the 50/50 split between defense and nondefense programs which is statutorily defined, nor do I think it could affect the exempt or partially exempt items of the budget, because they are very well defined.

I don't believe they would have the power to substantially change what they will cut. But I do think they would have power to change the economic assumptions and some things that would have an up or a down effect in a substantial way on the amount of the deficit that they are attempting to sequester. I have spoken with my friend, Senator Chiles, who serves as my ranking minority member and on your committee, and he may have concerns beyond what I have described.

But I do believe they could, as I have described, make changes that are outside of the parameters of what was done by them with CBO, and by GAO, and thus there may be some concerns.

Let me close my remarks by discussing whether the fallback provision as written in the law is apt to work in the event we neither amend or in the event we amend and find that the amendment is unconstitutional again. I can't say unequivocally it will or it won't, but if you want my impression, I would put it on the side of probably won't work. You want to know where I say probably: 60 percent chance it won't work.

I have given you about four amendments by way of timing that I think ought to be changed. We have put that sequester process and that joint committee into a very difficult position timewise, and we ought to give them some flexibility. We also give them too much time to report. Instead of 5 days, I suggested 1. I understand my friend Senator Chiles thinks maybe 2 days. That is all right with me. We ought to cut the time, and we ought to clearly provide for a discharge of that committee in the event they aren't getting the work done so that the issue comes to the floor for a vote on that across-the-board piece of legislation called a joint resolution.

We also ought to clear up the retroactive powers, because we may find ourselves in exactly the same position as last week. If the new fix is declared unconstitutional, it will be after it has been carried out. We don't have enough retroactive powers to cure the deficient order the way it is.

Now, in addition to all that, why is it apt to not work under my probability explanation? Frankly, I don't think you can use the first one as an example at all. First of all, No. 1, the dollar figure was fixed in the statute. Nobody had to make any assumptions. You recall the House wanted to bring it all the way down to $172.9 billion. We finally convinced them that was crazy. That would have been about a $38 billion sequester 5 months into the year. We compromised and took a dollar figure, so the sequester was $11.7 billion.

In the future, this activity will have to determine how much to sequester, for one thing. That will become a subject matter for the fallback consideration, and there is nothing that says the Congress won't get embroiled in that. We can continue to say you can't amend, you can't amend, and basically you can't amend until there are enough people who want to amend, and then you will amend. For now, they didn't want to this time, and that is pretty obvious, but the next time, God knows.

In addition, it would appear to me that even if the fallback might work, I believe you need the outside triggering mechanism with the order finally executed outside this Congress to get the full effects.

I repeat, however, that I do not support that with the idea that they will ever have to sequester. I believe we have the responsibility. If you look at the overall potential for Congress to fix the situation, I believe we will fix it ourselves, and I use that word in its best sense. I am not talking about con jobs, finagling numbers. I am saying we will come to our senses either sooner or later and avoid a sequester, but we are far more apt to do that and do it right if we are confronted with the realities of the sequester: That is outside of our control.

I would be pleased to answer any questions you might have, Mr. Chairman.

Chairman ROTH. Thank you, Senator Domenici. I think you pointed out very well some of the advantages and problems of the proposed solution. I agree that where there will be considerable concern about the role of OMB under Gramm-Rudman-Hollings II. I suspect that is why Senator Chiles has proposed a 1-year limitation on the delegation of such broad discretionary power to OMB. Unless one supposes that the words "due regard," bind OMB in principle to follow the recommendations of the GAO report, then OMB could have great discretionary power.

It does seem to me, and I would like your comment, that the proposal you are supporting to fix the Gramm-Rudman-Hollings law would place OMB in a rather ironical position. First, OMB is asked to make its projections based on what they think to be the appropriate economic assumptions. We all know, of course, that there are great differences among the economists as to where the economy is going. The old saying is, if you have 10 economists, you will have 10 different points of view, so that there are honest differences as to where the economy is going. But usually it is said that OMB is more optimistic than CBO.

In any event, these OMB projections go into the joint report with CBO. Then you ask OMB, under the proposed solution, to disregard its own best judgment and go ahead with due regard to the GAO report. Is that right?

Senator DOMENICI. Mr. Chairman, OMB had one shot at this, and they got into a conference with CBO with very broad power to come up with different views, different economics, different ratios of B.A. to outlays, and they seem to have been rather reasonable. They came out of that in good shape. They probably had differences. I don't know if they were as extreme as they may be in the future, but they did, and they were able to resolve them, and they did not appear to anyone, at least to my knowledge at this point, to be trying to skew them in some way that would lend itself to a minimal sequester, or a maximum. They came to some pretty reasonable and rationale decision.

It seems to me that one might look at that and say they didn't have to, and I would conclude that they probably will act reasonably in the future because you see, they first have to resolve their disputes with CBO, and if they are going to take an extreme position of great deviation from conventional economics or CBO, it seems to me they will make it right up front in the first meeting that they have with CBO.

That has got to be resolved under any of the options. Had Gramm-Rudman-Hollings been constitutional, they would have had to have done that in the first instance, too, and so I am not as worried about that as some are. I do believe it presents a political issue on the floor because there are many who are terribly skeptical of the issue, but frankly, I don't believe they will have much latitude.

As a matter of fact, I think they will have to exercise it in the first go around or they will be absolutely foolish, to do it one way the first round and then in the second round, when they make it final, come up with some wild things to avoid a sequester.

Chairman ROTH. I suppose the economic factors were not as important in the first go around——

Senator DOMENICI. True.

Chairman ROTH [continuing]. Because of the specific directions written into the legislation.

Senator DOMENICI. The chairman is correct.

Chairman ROTH. But certainly, there is some substance to the question that there could be a wide variance, as there have been in the past, as to how fast the economy is going to grow. I don't say that that is fatal, but I think that is a problem.

Senator DOMENICI. Mr. Chairman, if OMB's discretion is the biggest of the problems, then maybe that issue singularly, in terms of the second go around by OMB, could be dealt with in some way that is constitutional. I don't have it at present, but there some may be some way. Senator Chiles may have one.

Chairman ROTH. Let me just throw out a suggestion, one possibility that I referred to. Again, I have taken no position on any of these, but one possibility of correcting the constitutional problem might be to create a new office and to arrive at some ad hoc or informal agreement with the President that Chuck Bowsher, who I think a lot of people have confidence in, would wear a second hat. We will ask the constitutional experts what problems, if any, they see there. Would you care to comment on that as an approach?

Senator DOMENICI. Mr. Chairman, I have heard the statement and listened to the thought that perhaps a new entity ought to be created to do it. I think that we have to have this outside effective mechanism. I think it is so important that rather than lose it, we ought to do anything reasonable to keep it.

On the other hand, I have a couple of observations. This is so technical in terms of budget authority to outlay ratios, economic assumptions, spendout rates in the programs which would become kind of an exercise in some kind of expertise, that I would surely say if we are going to do it, let's not put some new entity in that doesn't already have the knowledge, because we are just inviting trouble. GAO does have the knowledge.

It may very well be that you could structure that. If you can, you won't find any objection from the Senator from New Mexico. I just don't know how you do it. You would have to borrow GAO's expertise, but I don't see where that creates any constitutional issue. It is a question of creating the office itself.

Chairman ROTH. As a practical matter, such a new office could borrow staff from GAO. It is also true that GAO, under its present authority, was contracting for outside talent.

Senator DOMENICI. Yes.

Chairman ROTH. Thank you.

Senator DOMENICI. Thank you very much.

Chairman ROTH. Any other questions, Senator Rudman?

Senator RUDMAN. Just a very brief question to be certain that I understand the distinguished chairman's testimony. There are really two issues that have been involved with any discussions leading to this proposed amendment as they relate to OMB power.

Senator DOMENICI. Yes.

Senator RUDMAN. The first one has to do with estimating the size of the deficit. The second one has to do with implementing the order. If I understand the distinguished Budget Committee chairman, he is saying that there remains a chance, although slim, of the OMB Director, after being part of the process, in making the final estimate, making a deviation. That is something that the chairman believes is not probable but possible. Do I understand the chairman correctly?

Senator DOMENICI. I say that is, indeed, a possibility and that no matter how small one wants to make the word possibility seem, it becomes a political problem that you and those who are sponsors and advocates of the reimposition of a valid triggering mechanism have to consider.

Senator RUDMAN. Would you like to venture a guess? Would the Director of the OMB go? Would he make the deficit higher or lower?

Senator DOMENICI. Well, historically, I would assume no reason to make any change. They want to make it lower.

Senator RUDMAN. I would agree with that. One other question, and that is the second part of my question. I want to make sure that I understand the testimony of the chairman clearly. I believe there is general agreement that the Congress has the absolute authority to write the guidelines not only in terms of the 50/50 allocation, but in terms of the Levin amendment, the program activity language, that there would be virtually no discretion in moving the numbers around within the cut itself, and that if we believe that ought to be made stronger, I believe the chairman of the Budget Committee would agree there is no constitutional problem with that. That is the Congress' authority.

Senator DOMENICI. I don't believe there are any problems with that. Let me say, Senator, let me just give a couple of examples, aside from economics, because I don't know that the economic assumptions are the only issue.

Let's assume advanced deficiency payments. There is a statute on the books. This is a $4.3 billion outlay item in fiscal year 1987 that is why I bring it up. That is a big item. That is almost the amount by which the Subcommittees on Appropriation in their first go around exceeded the budget resolution.

Now, CBO would interpret the law as an expenditure, even though it is discretionary, because we just did it, and they see no reason why we won't do it again.

OMB is sitting there representing the President. They say: We are the ones that decide that. After all, the discretion is with whom? Our boss. We aren't going to count it.

Now they have their first go around, and they get locked up, and CBO wins. OMB, in their fiscal report, says: No, you don't win, we overrule you. There is a $4 billion savings item. If it comes back into the top, for OMB to do it over again, they are going to say $4 billion, and I don't mind savings, if they are real.

The problem is that 3 months later, when you are through with this process and Congress gets up against the deficiency payments, they are probably going to say: If you didn't do it, Mr. President, we are going to do it for you. There goes the $4.3 billion.

Senator RUDMAN. I thank the chairman very much. I think the great fear that many people have, is that the OMB Director could sit down and somehow reallocate these cuts in a way that had a particular slant toward what this administration wanted against those things that it didn't want. I think that the chairman agrees with all of us who are working on this that the way this is written, that can't be done in any substantial way.

Senator DOMENICI. I would respond there is a high probability that they couldn't and a very high probability that they wouldn't as compared with the the use of possibilities in my testimony here.

Senator RUDMAN. I thank the chairman very much. If anybody deserves a prize around this town for taking a lead in this fight, it is the Senator from New Mexico.

Chairman ROTH. Senator Domenici, I think Senator Chiles has a question.

Senator CHILES. Do you have a minute, Pete?

Senator DOMENICI. Let's go.

Senator CHILES. We are talking about possibilities now and not necessarily probabilities. It seems to me that there is certainly the power there—the possibility is there—that if OMB wanted to they could use a high B.A./outlay ratio for domestic programs and a low B.A./outlay ratio for defense programs. For example, if $20 billion in outlays were to be sequestered, OMB could assume a 1 to 1 ratio for defense and a 3 to 1 ratio for domestic programs, which would mean you would sequester $10 billion in budget outlay in B.A. for defense and up to $30 billion dollars in domestic programs. It certainly seems to me that this power is there.

Of course, whether we can or will want to restrict that is unclear. The power is there. You would agree with that?

Senator DOMENICI. I would agree with that, and I also say they could have done it this last time. That one was not governed by the fact that we didn't need economics because the number was fixed. They still had to decide how many billions in budget authority they would cut in defense as mandated. They would have been overruled, perhaps, by GAO, but I believe they arrived at a pretty logical conclusion.

Senator CHILES. Under this, they would also have the power to make the estimate of the base spending levels for programs, and we know, of course, that can certainly affect——

Senator DOMENICI. That is correct.

Senator CHILES [continuing]. The programs. Then, of course, the third power they have is the using of economic assumptions. If they wanted to assume very optimistic economic assumptions, they could well differ from what CBO and the GAO would say would be the economic assumptions.

Senator DOMENICI. Let me say, Mr. Chairman, for those of us that have been working in this field, and some people think budgets are like we do at home, that this law and our national budget frequently borders on being esoteric. Instead of a budget, we all knew these problems that the distinguished ranking member of the Budget Committee said were there when we said: OMB and CBO, you all sit down and do it. We were absolutely amazed that in a very short period of time, they could resolve the issues that they did.

I am not suggesting that he is wrong. The Senator is raising the issues; he is right, and I have answered them forthrightly. But frankly, there has to be a willingness to make this work.

Senator CHILES. There is one other difference that I have some concern about, and that is when they made those original differences, they knew they had GAO as the impartial arbiter. Now, if you don't know that you have an impartial arbiter, you have got a different situation.

Senator DOMENICI. I agree. Thank you very much.

Chairman ROTH. Thank you, Senator Domenici.

[The prepared statement of Senator Domenici follows:]

PREPARED STATEMENT OF SENATOR DOMENICI

Mr. Chairman, let me start by thanking you and the distinguished members of your committee for this opportunity to discuss with you the implications of various proposals to change the Balanced Budget and Emergency Deficit Control Act, or Gramm-Rudman.

We are here today because the Supreme Court has declared unconsitutional the operative provisions of the automatic sequester process. In many ways it is a sad commentary on our modern day legislative and budget process that we are here today having to discuss an automatic procedure affecting our country's future and present fiscal policy. For while I support efforts to correct the errors identified by the Court, it is my fervent hope that these automatic procedures need never be used.

The theory underlying Gramm-Rudman is that the threat of automatic across-the-board cuts would be so politically galvanizing as to force Congress and the President to make prioritized cuts beforehand in order to avoid a sequester order. I believe that putting the teeth back into sequestration by overcoming the constitutional flaw will help to keep up that much-needed pressure. Hopefully Gramm-Rudman will work as intended, and we will all play our parts on the budgetary stage to reduce the deficit.

However, I have some ancillary concerns that I would like to share with you. There is no guarantee that Congress will adopt so-called "Gramm-Rudman II", though I hope it will. Furthermore, I fear there is no guarantee such an amendment, if adopted, will pass constitutional muster, though, again, I hope it will. If we don't fix it, or if the fix is held to be unconstitutional, Gramm-Rudman will continue to operate through the fallback procedures set forth in section 274(f) of the Act.

As we saw last week, the fallback procedure has some serious flaws. It is intended to provide expedited, protected consideration of legislation which provides across-the-board sequestration. But in certain circumstances, the procedures are ill-timed, clumsy, and inappropriate.

The major problems are the schedule, the inability of the Temporary Joint Committee to affirm a sequester that is already in place, and the confusion over whether the Temporary Joint Committee can be discharged from introduced legislation.

First let me discuss the schedule. As it currently exists, the Act provides that OMB and CBO take their snapshot of the fiscal year 1987 deficit on August 15 and sent it to the TJC on August 20. If the joint resolution reported by the TJC is enacted, the President is to issue his initial order on September 1, and it goes into effect October 1. On October 5, OMB and CBO take their second snapshot and sent it to the TJC. If the joint resolution is enacted, the President issues his final order on October 15, and it is effective immediately.

The problems with this schedule are obvious. It does not mesh with the normal August recess period. This very year, for example, Congress is not scheduled to be in session between August 20 and September 1. In fact, we are not due to return from the Labor Day recess this year until September 8. Even through the TJC will not receive the OMB/CBO report until that date, and we could enact a joint resolution shortly thereafter, there is no authority for the President to issue the initial order on any day other than September 1. Moverover, the TJC is not scheduled to receive the second OMB/CBO report until October 5, while Congress is scheduled to adjourn sine die on October 3.

I think it would be advisable to collapse the fallback schedule significantly, and to change what are currently specific dates to floating requirements, so that each step takes place within a certain length of time after the prior step, rather than on a date certain.

What I have in mind is this: OMB and CBO take their first snapshot on August 15. They transmit their report to the TJC on the first subsequent day that both Houses are in session. The TJC has one calendar day to report the joint resolution. The chambers must vote on it within two days of session after it is reported. The President issues his initial order within two calendar days of signing the joint resolution or of our veto override. The initial order goes into effect October 1. OMB and CBO take their second snapshot and transmit their report to the TJC on October 2. The TJC has one calendar day to report the joint resolution. The chambers must vote on it within one calendar day. The President issues his final order, effective immediately, within one calendar day of enactment or veto override.

This revised schedule will ensure that the process is completed by October 5, at the latest. I suggest reducing the number of days for TJC action and floor consideration because extended deliberation in the TJC is made unlikely because we cannot amend the report, and because floor debate is limited to two hours in each House, with no amendments in order.

I realize that this collapsed schedule will be difficult to follow at certain stages. But I believe it will work more efficiently, particularly in election years.

The second issue is retroactivity. We dealt with this last week. The fallback, as it currently exists, does not take into account a situation where an order is issued pursuant to a mechanism which is later invalidated. Last week, the TJC faced the question of ratifying an order that had been in effect for over four months. But the TJC could not report a joint resolution to do this. The TJC could only report a joint resolution affirming the January 15 report from OMB/CBO. However, that report did not reflect what the February 1 order did, because of intervening changes made by GAO. Because Congress' desire was to ratify the status quo, including changes made by laws enacted after February 1, we had to pass a separate concurrent resolution which directed the enrolling clerk to change the joint resolution in order to fulfill our intentions.

This problem may arise again if the so-called "Gramm-Rudman II" fix is enacted, resulting in a presidential order, and the Supreme Court subsequently invalidates the new automatic procedure.

This situation can be taken care of by providing the TJC with the authority to report legislation retroactively ratifying a presidential order.

Another issue concerns the discharge of the TJC should a joint resolution to affirm the Directors' report be introduced in either chamber and referred to it. In the Senate, such a discharge is inferred because of the deadline set for the Committee's action. This is not the case in the House. It seems to me that members of *both* chambers should be able to further the sequester process by introducing legislation and ensuring a discharge, so that even if the TJC is not able to act, the full Congress could exercise its will and vote on the joint resolution.

This problem can easily be taken care of by inserting in the statute langauge which specifically provides for such discharge in both chambers.

Let me conclude by saying again that I intend to do everything I can to make sure that neither automatic sequester procedures nor the fallback need ever be used in future years. But since we have these procedures, it behooves us to try to make them work as they were intended.

I thank the Committee for the effort expended in discussing these issues. These hearings are essential in determining the best response to the Supreme Court decision, and I commend the Committee for its foresight.

Chairman **Roth**. At this time we are very glad to have as our next witnesses Senator Gramm and Senator Hollings to speak to us about legislative answers to the Supreme Court rule. I think all members of the committee received last night the latest scoop, the most recent copy of their proposed Balanced Budget Emergency Deficit Reduction Act.

So we look forward very much, Phil, to you and Fritz, to present your proposal. Please proceed.

TESTIMONY OF HON. PHIL GRAMM, U.S. SENATOR FROM THE STATE OF TEXAS; AND HON. ERNEST F. HOLLINGS, U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator **Gramm**. Mr. Chairman, thank you very much for holding these hearings. We are obviously talking about a subject that is important. We have set out a commitment to the American people to bring the deficit under control, to balance the Federal budget. I think the Supreme Court's decision is reflected in the fact that there has been a substantial reduction in the stock market. The stock market fell by 62 points. The stock market has, in essence, been in the doldrums since. Despite the efforts of all those whose jobs it is to sell stock and promote optimism, the truth is that the market reacted to the Supreme Court decision because it created uncertainty.

I would like to try to outline briefly what the court did; what the backup provision is; why I think there are problems with it that we want to deal with; what our solution is, and to try to answer a few of the points that have been raised. I'll try to do that in such a way as to deviate from my background as a school teacher and be brief, so that Fritz can give us the straight scoop on it.

First of all, Mr. Chairman, the Supreme Court did not strike down the automatic cut mechanism. The Supreme Court has ruled against the argument that we were trying to create an improper delegation of power. They upheld an argument that was made by the Justice Department to both the three-judge panel and to the Supreme Court that everything in the bill was constitutional except the person we picked to be the certifier of the deficit, on which the automatic triggering mechanism would be based. It's not that there was a problem with the automatic triggering mechanism, but that we chose the wrong person to do the job, because of a then obscure—now well-known—provision of the 1921 Budget and Accounting Act which gave Congress the ability to remove the Comptroller. This created a separation of powers problem.

That puts us back to a fallback provision that was written into the law because we were aware, of course, in the conference on this bill, that there was a 60-year-old constitutional dispute over the role of the Comptroller General and who he worked for.

Now, the backup provision simply has the Congressional Budget Office Director and the Office of Management and Budget Director meeting and reporting jointly an estimate about the state of the economy, converting those economic estimates into a projection of the deficit; measuring that deficit against a target set out in law. On this basis, if the deficit exceeds the target set out in the law by more than $10 billion, the joint report specifies that difference and given the programs that are subject to cuts as determined by the parameters set out in the law, it defines what the automatic cut order would look like.

Under the original provision which was struck down by the Court because of separation of powers problems with the Comptroller General, that order was reported to the Comptroller General who, in essence, audited it and certified it. Then, if Congress had not done the job, and if the deficit exceeded the target by $10 billion, we then, in essence, had 45 days to get on with the job of meeting the target. Otherwise, an across-the-board cut would go into effect automatically.

Now, under the backup provision, CBO and OMB would report not to the Comptroller General, but to the Congress, and the Congress would have a vote under highly expedited procedures: No filibuster, no substitute, no motion to table, 2 hours of debate, up or down, on certifying the deficit, defining the problem.

There obviously is a great deal of dispute about whether the process would work. I very seldom disagree with the distinguished chairman of the Budget Committee, but my guess, and a guess is all that it is, as to whether Congress, having committed to the Gramm-Rudman-Hollings bill by vast majorities in both Houses and both parties, is that when it came right down to it, I believe we would admit the problem existed and get on with doing it.

The problem comes from the uncertainty. Gramm-Rudman-Hollings is not a perfect bill. Obviously, the people who wrote it were not perfect, and we couldn't expect it to be. But the idea is to force Congress to make decisions. As the distinguished members of this committee—all of whom are more senior than I, realize that uncertainty does not promote action.

The problem with the fallback provision, pure and simple, is that it is a new process we have not made to work, and as a result, there will be the tendency of both the White House and the Congress to do nothing, waiting to see if Congress will, in fact, admit that the problem exists. But even if we then admit the problem, we will have delayed action, not formed a consensus, and not disciplined the appropriations process. Then we would find ourselves with a legislative train wreck and an economic disaster.

Our proposal is a very simple proposal. There may be an infinite number of ways of solving the problem, but we wanted to do it in the most direct and clearly constitutional manner. We do that by simply staying with the current process, where CBO and OMB report jointly on their findings concerning the deficit; that number is certified by the General Accounting Office; it then goes to the Director of OMB, who, within the constraints of due diligence, in looking at the work that he himself has participated in, certifies the deficit as an officer of the executive branch of Government.

At that point, if we have not met the targets, then Congress would have a period of time, in essence, the month of September, to do something about the problem. The President would have the same pressures, and it is my belief that, in fact, I am confident, Mr. Chairman, that within the constraints of certainty, that if we do not do our job that there is going to be an across-the-board cut; that within that environment of certainty, that we will do our job; that there will not be an across-the-board cut, at least one will not go into effect given our 30 days to do something about the problem.

We have now discussed this proposal at great length with the Justice Department, with distinguished lawyers, and we are confident that we have a vehicle which clearly will withstand constitutional muster, and that there is really no constitutional question to be raised about it.

Let me address very briefly this whole concern about discretion. Let me begin by making it clear that we are not talking about the setting of public policy in trying to estimate the deficit. We are talking about a green eyeshade function. That does not mean that there is not discretion in green eyeshade functions, but it is important to understand that the discretion is not related to public policy.

It is related to technical judgment, as to what the economy is doing this year; what it is likely to do next year; what the inflation rate is likely to be; how do the growth rate and inflation rate interrelate in terms of expenditures and in terms of revenues?

Those are technical factors, and to the extent that discretion exists, it will exist in that area. It already exists in the process. The Director of OMB already has discretion in terms of his input with CBO in the initial process. From that point of view, other than having two bites rather than one, there is no really relevant change in the process here. A point that I think also needs to be emphasized is that to the extent that there is technical judgment as distinguished from discretion, that technical judgment is in defining the problem; it is not in carrying out the automatic cut.

The law that is written as Gramm-Rudman-Hollings is very specific in terms of the division between defense and nondefense; in terms of the application of the across-the-board cut by program, project, and activity. Now, there is no ironclad guarantee, just as I said when this bill was adopted, that we have not built a four-sided fort that we can go to sleep in. This bill doesn't end the work; this bill begins the work. All this bill does is give us a good wall to our back in terms of trying to fight a very difficult battle to put the Federal Government on a budget like everybody else, and to strengthen the economy.

Obviously, there are possible ways of manipulating spendout rates that make possible the argument that if one set about trying to manipulate the findings, that could be done. But I think the relevant factor here is that one is strained to come up with any reasonable kinds of manipulations that would have very much impact. To the extent that there might be a problem with the spendout rates as raised by the distinguished ranking member of the Budget Committee and the ranking member of this committee, we certainly have the power in an amendment to Gramm-Rudman-Hollings II simply to define the sequester order such that the spendout rates that have existed historically or that existed last year will be used. That is not a problem that raises any constitutional issue, clearly, or one that we can't fix.

Finally, Mr. Chairman, in concluding, this new proposal, like the first one, did not come down from Mount Sinai. It is not perfect. It probably can be improved. We are open to suggestions, but we are not open to the suggestion that because it is imperfect, that it is worse than nothing; because it is not totally foolproof or mischief-proof, that the correct alternative is to do nothing.

To do nothing is to guarantee the perpetuation of the problem. We have made progress. We have taken an important step. We are close to meeting the target. In my opinion, if we can reconstitute the Gramm-Rudman-Hollings bill, if we show due diligence in the appropriations process, if we commit ourselves to the process, we can make the target this year, and I believe that that is vitally important.

One final point: I am not in favor of taking action to have a solution for only 1 year. I am certainly willing to come back and review it, and I am willing to commit here today that if there is any reasonable question raised about the process, that I will support reviewing it. But the one thing we need more than anything else is certainty, so that the capital market, so that the investment community, so that the President, so that the Congress all know what the rules are, that they are going to be in effect unless something better comes along between now and 1991, and that we are going to meet the targets. That is the kind of certainty we need to achieve what we want to do.

This bill is not an end in and of itself. It is a vehicle to try to achieve something that has eluded us, and that is the reimposition of fiscal responsibility in the country and Congress.

Chairman ROTH. Senator Hollings.

Senator HOLLINGS. Mr. Chairman and distinguished members, let me first express a frustration, certainly not with this committee. It is with tremendous pride and respect that I have for this committee that I come before you, but I am thinking in terms of national versus local government. I can't for the life of me understand the premium we put on irresponsibilities here at the national level.

All of us have served at the local level. If you were a mayor, you tell everybody, "Look, we have run out of money. Let's just hold the line; keep the programs this year, and just do the same next year, because we don't have the money." We would have a freeze. We tried that for 4 years around here and couldn't get anywhere.

But you in the State government, you have got to maintain your credit rating. Everybody sees you are low-rated on your bonds; it costs the budget even more money again, and again, and so 43 States in America have what we are all arguing about. Nuclear power, we are going to ruin this, going to destroy education, going to disband the army. I will never forget that guy was running all around like a chicken with its head off, about, "We are going to have to cut 300,000 out of the Armed Forces." It is outrageous nonsense. We don't increase anything; we don't decrease anything. We just say, "Let's have truth in budgeting."

What we have, in essence, here, is nothing more than, in January of this year, what occurred in South Carolina. Governor Reilly got a certificate from his comptroller that he had overestimated his revenues last July, a year ago. The textile industry, the farm economy is down, and so he ordered the Treasury to sequester 2 percent, all right straight across the board of the particular programs, and we had at the end of June, last month, the ability to pay our bills, maintain our credit rating, balance our budget.

That happens at the State and local level every year without all of this national outcry about, "We are avoiding responsibility." They know what we are doing. We are fixing. We tried intentionally to paint you and me and the President all into the same corner so we would cut out this charade of pointing fingers and no one being responsible and running $200 billion deficits.

As between Gramm-Rudman-Hollings and the Comptroller, the Comptroller was certainly far, far and away more important to this Congress. He has been a magnificent instrument, and where we first were thinking in terms of the Comptroller, the authority to fire him being transferred to the executive branch, we talked to the Comptroller and everything else. We all agree that we didn't want to get down that road at all. If one of the other had to fail—I don't believe it is an either/or situation, I don't believe anybody does—but if it were that kind of either/or, we want to maintain this Comptroller and the leadership of this committee toward trying to hold down the cost of Government.

In that context, you folks have been a big help. We have maintained the discipline, and in February, March 1, we cut $11.7 billion. On a point of order, we saved $1 billion on the farm bill. On the reconciliation, we saved another $18 billion. Both Houses have passed a budget cutting next year's deficit $38 billion.

The chairman here was a leader on tax reform. All on the Finance Committee maintained a revenue neutrality requirement for members that helped us pass that tax reform. Now the Finance Committee is going forward with its reconciliation.

So we have got a marvelous kind of discipline, totally unusual over my 20 years. I have been up here 20 years and I've never before seen it. Now we are beginning to see it for the first time. Now along comes all of those running for national office and otherwise trying to gain the favor with the special interest groups who still misunderstand. Women, infants and children and feeding is protected by law of Gramm-Rudman-Hollings, not cut. The Food Stamp Program is protected by law is Gramm-Rudman, not cut.

I am a candidate now, so I know what the questions are on the train, and I am running all over making those answers. I don't know how I am going to end up on November 4, but I am ready for the fight and ready to make the explanation, because the rumors are there. It's said that we have ducked our responsibility. My distinguished colleague from Colorado said on the floor last Thursday afternoon that, "We are ducking our responsibility, we just won't vote the cuts."

You know what we were doing at the time? Voting the cuts; voting the cuts. Can you imagine such a thing—outrageous nonsense. They are playing to that screen, and that is what they carry on the 7 o'clock news.

So let's try and help us maintain a discipline. In that light, what we have tried our very best to do is to set limits. There are some questions about the Comptroller that all of us are concerned about. He has, perhaps by that decision, Mr. Chairman, lost some authority to enforce orders, to reconcile governmental contracts, or to order certain savings. We want to fill that gap, but we want to leave that for Government operations and the Congress generally.

All we want to do now is to fix the constitutional flat tire. We got a flat tire on the way to the Supreme Court. We have got a spare in the trunk, but there is uncertainty in jacking up the car and putting on the spare. I can tell you right now that Senator Gramm has emphasized we would prefer to have it fixed. There are those who don't want it fixed. They don't want it at all. There will be an amendment to kill Gramm-Rudman-Hollings outright. But what we really need to do is just fix that flat tire, and in doing so, we have found, from talking to the leadership on this committee, talking to them in the Senate, talking to those with respect on the House side, in more than several meetings that we have had over there, that if we just transferred this authority, then, from the GAO to the Office of Management and Budget, we can do the job.

Two years ago, with Stockman, no chance. I wouldn't trust him to do anything, I can tell you that right now. He was the worst charlatan I have ever seen in Government in my 35 years of service.

Now, we have the President and a new Director of the Office of Management and Budget. We have seen how they have treated Gramm-Rudman-Hollings and their responsibilities thereunder in February. With that particular precedent and with the requirements of the statute, with due regard to the data, the assumptions and the methodologies, we think we have got it pretty well locked in. And if not, we have got 30 days to do what we want to do. If the President wants to veto that, then there is no fiscal responsibility; there is no discipline; there is no cutting back on the deficit, then he can assume that responsibility.

But I don't believe he is going to act in that vein. We, the President and an overwhelming majority in the House and the Senate, realize that we want something done about these deficits. This, in my opinion, is the best way to go about doing it and fixing in that certainty. You can't fix it in totality; you have got to have a discretion with that Director of the Office and Management and Budget to avoid questions of constitutionality.

But otherwise, let me try to answer your questions and plead with this committee to give us a suggestion; give us an amendment, we can change this if it needs to be changed, but so far, we have simmered it down, I think, to the hard core. In respect to the time, really, we will be awfully close to the debt limit. So any suggestions that the committee has we would welcome pretty soon, because this thing could come up today, or later this week or next week.

Chairman ROTH. Thank you, Senator Hollings and Senator Gramm, for your proposal. Let me start out by saying that as far as this Senator is concerned, what I am looking for is the best way to fix the constitutional defect in the law.

Senator HOLLINGS. Right.

Chairman ROTH. So my questions are not intended to be hostile but to try to determine what are the strengths and weaknesses of your proposal and others. Assuming that it is the will of Congress to fix the law, how can we best accomplish that goal.

Let me just, for clarification purposes, Phil, point out that all the Supreme Court decision really did was to declare that because the Comptroller General is removable by Congress, we conferred improper powers upon him as a servant of the Congress.

The Chief Justice very specifically makes it clear in a footnote that they were not ruling on the constitutionality of other provisions of the Act, including one I think Senator Chiles brought up, the question of whether or not it violates the delegation doctrine.

So I think we have to understand that the Supreme Court has not ruled on the constitutionality of other aspects of this particular law.

I would say to you, Senator Hollings, I am very pleased that you agree with us that it is critically important to retain the independence of the General Accounting Office.

Senator HOLLINGS. Yes, sir.

Chairman ROTH. I welcome those remarks. The one area of concern in your proposal is the one that, of course, was discussed in some detail with Senator Domenici, and that is the discretionary authority that would be given to OMB as a substitute, in effect, for the GAO.

I would have to say, Senator Gramm, that you make this role sound merely clerical in function. There I would have respectfully to disagree. In determining the assumptions about where the economy is going and the other factors that go into making up predictions, of both revenue and spending, significant discretion is exercised.

Senator GRAMM. Let me respond.

Chairman ROTH. If I may just first complete my thought, then I would be pleased to have your comments. It seems to me that it would be a mistake to underplay the importance of that aspect of your proposed solution; you are putting OMB into the process at two different stages. There can be honest difference of opinion. In the first round, it was not that important, because you built a cap into the legislation, as you recall, so that economic assumptions were of not of the critical importance that they will be in the future.

But I think we all have to understand, there are great differences, great differences in good faith as to where people see this economy going. When you say to OMB, "We are asking you to use your best judgment at the first level when you make up your first projection, but later on, you are supposed to use 'due regard' for the joint report," aren't you really trying to say, that OMB is to adhere to the recommendations of the joint report?

Senator GRAMM. Mr. Chairman, if I might respond, when we are saying due regard, we mean that OMB is to look at the findings that have been given to them. The one thing the Supreme Court is very clear on is that an executive branch entity has to make the final certification, and so the reality we are looking at in trying to write a provision that will withstand constitutional scrutiny, which is what we all wanted and have always intended, is that you are going to have to have the executive branch entity that will make the final decision.

If you want to do that, the logical one to have is someone who knows something about the technical factors. The decisions of clerks do not constitute irrelevant decisions. In fact, the world is run by little elves. But a clerical decision is not a policy decision, and that was the point I was trying to make; not that they are not important, but that they are not policy decisions. They are clerical decisions in terms of trying to make a judgment, make a judgment based on a set of technical factors rather than setting out a policy objective. I think that is a very relevant factor.

Chairman ROTH. I would have to, I guess, respectfully disagree. It seems to me that we are asking OMB and CBO to make certain basic assumptions, which are in no sense clerical, but are in fact a very sophisticated type of economic projection and prediction. In any event, it seems to me that that is the crux of the issue and that is the reason you hear a proposal made that we have a 1-year limitation on your solution.

I have to say that I strongly agree with you that a 1-year limitation might cause us to lose a number of the benefits of Gramm-Rudman; that we do want some certainty in the picture. So I agree with Senator Hollings or Senator Gramm, whoever made the comment, that it would be better to try to fix it permanently if we can.

Let me just ask one more question. We have got a number of other Senators here. One other possibility, and there are several—time doesn't permit us to explore all of them—but one other possibility would be to create a special office, as I mentioned earlier, and to try to get some kind of informal agreement, obviously, not legislative, that Chuck Bowsher would wear a second hat, independently. Do either one of you care to comment upon that as a possible alternative?

Senator GRAMM. Go ahead.

Senator HOLLINGS. We considered that, but you come right back. He wouldn't be in a majority in a special commission. You might as well go ahead and fix that responsibility.

Chairman ROTH. We are not saying necessarily a commission. You could designate one individual, create a new office and designate one individual to discharge the roles that were given the Comptroller General. Then what I am suggesting is to try to reach an informal agreement between the congressional leadership and the President; that if we did this, that Charles Bowsher wear a second hat and be that designee.

He would discharge what he did before, not as the Comptroller General, but as an administrator in charge of deficit reduction or the director of deficit reduction.

Senator HOLLINGS. But if he comes, in anyway, under the influence of the executive branch, you have got an overwhelming majority of the Congress that says, "Don't, in any way, blemish his ability to criticize the executive branch."

I can't see him assuming any of those duties. The Comptroller General is the tool of the Congress, and I wouldn't want to compromise him in any way. Back to our original observation, let's don't fool with the Comptroller General. To work him while the Gramm-Rudman-Hollings process works as another matter.

Chairman ROTH. Let me underscore, he would not be acting as Comptroller General.

Senator HOLLINGS. I know, but you give him a second hat. But they are moving around under that second hat; then he would be somewhat obligated.

Chairman ROTH. He would be moonlighting. [Laughter.]

Senator HOLLINGS. He would be moonlighting.

Senator GRAMM. Mr. Chairman, if I can respond, first of all, you are going to break the separation of powers if you mandate that the President appoint a particular individual.

Chairman ROTH. No, no. I wanted to make clear: You are not legislating. It would have to be an informal understanding.

Senator GRAMM. I guess I would go back to Fritz' statement, Mr. Chairman. I would say we weren't on the way to the Supreme Court; I would say we were on the way out of the desert, and we got a flat tire. We've got a colleague from Colorado who suggests that now we ought to blow up the car and walk. [Laughter.]

We could probably re-engineer the car and come up with a better tire, or we might try to put wings on it and fly out. But I guess what we are saying is that time is short, the problem is great, and we have come up with a good, solid, four-belt steel radial that we think will probably get us out. We are just not sure when you get into trying these special offices, these two hats, what is going to happen in terms of constitutionality. Quite frankly, we want to legislate what will work; we don't want to be back in the Supreme Court.

Chairman ROTH. Senator Rudman?

Senator RUDMAN. Thank you. I have enjoyed listening to these two colleagues of ours who are masters of the metaphor, to say the very least. [Laughter.]

Senator HOLLINGS. We might add that is our only chance to talk, when you listen. [Laughter.]

Senator RUDMAN. Mr. Chairman, I don't have a question, but if I could be allowed a brief observation, there seems to be a thread running through some of the questions here this morning that I would just like to address from the point of view of the Supreme Court decision. If it wants to, the U.S. Congress, under its constitutional authority, can, in fact, bind the Director of OMB to economic assumptions; can bind him as to his discretion in doing those things, and can set the most restrictive kinds of calculations he can use, in, for instance, determining budget authority to budget outlays, as long as this is done by statute, signed by the President of the United States. I am not sure we want to do that, but I know that Senator Chiles and I and our staffs have been talking about various things that he has been interested in

That is what this is all about. That point has been missed by many people. You will not find a constitutional expert in this town that will disagree with that. We have the right to do this, because we have the constitutional authority to regulate the public debt and to appropriate funds. That is in the Congress, not the President.

Now, how far we want to go in doing that, that is a question that has been the subject of discussion. We have not addressed that here, but that is the fact of the matter. Let us not confuse this issue with the problem we have had with separation of powers, which was having an unelected official, not removable by the President, who was able to bind the President in doing something.

This Congress is paramount in the area of setting economic assumptions, telling the OMB what they can and cannot take in account in the first go around or the second go around, and additionally, in terms of how we restrict what they do in caps. There is little question in the mind of anybody that I have talked to that the Congress can do that by statute, if it is signed by the President.

That is a very important point that we want to make very clear. Because I am sure, Mr. Chairman, that by the time we get down to debate this on the floor and over in the House of Representatives, there will be talk about all this power we are giving to OMB. The fact of the matter is that the way this bill was drafted, the amount of power given to the Comptroller, and now to OMB as a substitute, is quite limited. If we wish to type in more limitations, and I am not sure I do, but if we do, we don't have any constitutional inhibition to doing it. I wanted to make these observation.

Chairman ROTH. I think everyone agrees with your point, Senator Rudman, and there certainly are a number of limitations written into the law.

Senator Chiles?

Senator **Chiles**. I don't have any questions. I think they have covered most of the things that I was concerned about.

Chairman **Roth**. Senator Stevens?

Senator **Stevens**. Mr. Chairman, I just want to ask these gentlemen a question. I understand we are here today to talk about fixing the Gramm-Rudman-Hollings procedure because of the Supreme Court's opinion. However, I am worried about some other issues. The House is not bound, under the changes that were made by your amendment, to the budget resolution limits on budget authority or on outlays until the conference report level. There is no point of order in the House on the failure to comply with either one until the conference report level. There is no point of order left in the basic law itself against adjournment without passing the Reconciliation Act.

The defects in the Budget Act itself are greater than the defect that the Supreme Court put its finger on in terms of who is going to hold the final hammer to carry out the procedure that was outlined by your amendment.

Why don't we fix the problems that will prevent Congress from taking action to prevent sequestration rather than sit here and argue about which hat the Comptroller General should wear or who should hold that final hammer?

The Budget Act itself now, in my judgment, is not effective to give Congress the ability to finally work out the differences between the two Houses to prevent sequestration. Why should we fix that before we worry about this other thing of who is going to finally bring about sequestration?

Senator **Gramm**. Mr. Stevens, if I might respond, having sat through many days of conferences, it was our intention that the same sets of rules be applied in both Houses. But as you are aware, each body has a right to set its own rules, and it was a considerable victory to get the House leadership to apply the binding constraints on the final conference reports, and they absolutely refused to do it in terms of their individual appropriation process.

Now, in my opinion, that makes their job harder than ours. It means they don't have to make the tough choices as early as we do since we do have binding down to the 302(b) levels in appropriations or down to the subcommittee level. But they ultimately have to achieve that in the conference report. Quite frankly, I think that whole willingness to commit to discipline shows that they are not yet as fully in the harnesses as we are, and I think it is also clear that there will be a move in the Senate to strike the binding features of the bill so far as the Senate is concerned. I am going to vigorously oppose that.

But the truth is, what we are trying to do here is to keep the enforcement mechanism at the end, which will allow us, despite our inability to control the House rules, to force them to participate in the process.

Senator **Stevens**. In the final analysis, you have control of the appropriations process, but we don't have control over the reconciliation process any more by the error that was made in the final version of the bill in knocking out the point of order against adjournment of either House prior to the passage of the Reconciliation Act in its final form. Without the Reconciliation Act, sequestration is assured, is it not?

Senator **Gramm**. Again, I believe if you look at the original Budget Act itself, that we have strengthened that act in virtually every way. We do not have as strong a bill as I would like to see adopted, but our problem was that we had to have adoption by both Houses in order for Gramm-Rudman-Hollings to become law.

In terms of the same kind of binding constraints that we imposed on the Senate rules, we could not get the House to accept those constraints.

Senator **Stevens**. But those restraints only apply to the appropriations process. There is no congressional restraint on the reconciliation process, and I was informed last year that it was due to an error in the final engrossing of the Gramm-Rudman-Hollings amendment. If there was a point of order prior to the adoption of that amendment, there was no longer a point of order in the act. It was knocked out by an error, they tell me. Are we going to have support that Gramm-Rudman-Hollings will restore that point of order for the Reconciliation Act procedure?

Senator **Hollings**. If we can get it in and hold it in, fine business. It is going to be difficult, I can tell you that, on the House side.

Senator **Stevens**. If it is difficult, then it wasn't an error.

Senator **Hollings**. I don't think it was an error, oh, no.

Senator **Stevens**. We were told last year it was an error strictly in the way it was engrossed. If you look at your amendment, you didn't touch that.

Senator **Hollings**. We intentionally didn't touch that. There is another amendment in there that you can't go on the July 4 holiday until you pass certain bills.

Senator **Stevens**. That was the one when they engrossed it and knocked out the whole section before.

Senator **Hollings**. Every one of those killer provisions, Senator, in all respects, and many things in here—you know, the majority of the U.S. Senate would have sequestered Social Security. But we had to be realists and so we just set that aside. There were a lot of things that we had to give and take in order to get this far down the road.

Senator **Stevens**. Mr. Chairman, I don't want to belabor it, but I think that the problem right now is that we are working hard in the appropriations process to try and avoid sequestration. There is no mechanism left in this act to avoid sequestration through the reconciliation process. Unless that is put back in there, we are just tilting at windmills. There is no way that this act can work without some meaningful sanction against the Congress going home and leaving the reconciliation bill on the table.

Senator **Hollings**. Can I give just one comment, please, Mr. Chairman? In response to the distinguished Senator from Alaska's misgiving about that failure of the bill, and also the matter on the discretion of OMB, we all are operating within the arena of an attentive public. We said at the time, and Phil adopted this description, that we weren't Dale Carnegies; in other words, we didn't pass this because we were super salesmen.

This bill was got together not by politicians around the conference table, but by the American families around the kitchen table. Now, with respect to that description, if I were in the democratic arena giving a political answer—but it would be a pretty good one, and a true one—I'd say, "That is what you rascals have been trying to do since the beginning of Ronald Reagan, is fix the responsibility for that deficit on him."

You take a poll in South Carolina or in Alaska and ask, "Who is responsibile for the deficit," and they will say, "The Congress." They don't say President Reagan. I'll have to oppose Reaganomics and Gramm later. I am his buddy now.

Senator **Gramm**. Your signing.

Senator **Hollings**. When I said we were going to have a $200 billion deficit, I hated to put up a fight and make the hard votes and then go around being blamed for the result. Mr. Chairman, under the discretion to be given OMB, let's say, if you are talking in extremes and the Director of the Office of Management and Budget comes in and says, "There is going to be 6 percent real growth next year," and CBO and the GAO says it is going to be 1 percent and all the economists, Kaufman and the others, Solomon Brothers, say it is going to be 1 percent. Then coming to the final judgment, when it is passed on to the President, the OMB still says, "It is going to be 6 percent. I am going back to my original figure," he is going to have to assume the responsibility for it, and then all the Democrats are going to be happy anyway, because they didn't want to cut anything. [Laughter.]

So what is everybody complaining about? [Laughter.]

Senator **Stevens**. I am basically complaining that you have an unworkable procedure, and you are trying to deal with who enforces the procedure after it fails.

Senator **Hollings**. It worked in the House just this past week.

Senator **Gramm**. Our problem was that this was not a marriage of love with the House.

Senator **Hollings**. Yes.

Senator **Gramm**. This was a marriage of necessity, and they weren't at all happy about being at the alter. [Laughter.]

We were just lucky to get the vows made. You are right.

Senator **Stevens**. We don't want to continue that much further, because I am not going to get in bed with the House. [Laughter.]

Senator **Gramm**. I want to be in control of the rules, if I do.

Chairman **Roth**. Senator Nunn?

OPENING STATEMENT OF SENATOR NUNN

Senator **Nunn**. Well, I just want to make a brief observation and invite comments from Senators or Hollings or Senator Rudman or Chiles, either one, any of you. The little elves on the Armed Services Committee are having a real problem. We have got a problem because Gramm-Rudman-Hollings has shifted the whole focus of defense to an outlay measurement; how much we spend in 1 year.

Now, that is the way you measure the deficit, so I am not saying you had another alternative, and I am not complaining, but the problem is the executive branch, the President's budget, OMB, are not taking outlays seriously regarding defense. They sent up a budget that was $15 billion over what they projected in outlays. That has thrown the whole thing off kilter. The American people don't recognize that the President's budget does not even come close to meeting the Gramm-Rudman-Hollings targets, because the outlay number on defense was grossly underestimated.

Whether that was a political game or a mathematical game or simply an economic error, I don't know. Now, we have got another problem. The Budget Committees and the conference, particularly, played games with the outlay budget authority ratio in defense, and that makes an enormous amount of difference. I know what happens in conference. I have been part of the Budget Committee. What happens in there is the way you get a deal on the defense number, you satisfy the Hawks by giving them a high budget authority; you satisfy the Doves by giving them a low outlay number. Senator Goldwater and myself and others are the little elves, as we might call ourselves. We are having to struggle with that.

Now what we face is that there is no way we can come up to the ceiling, $292 on budget authority, and still meet the target outlay. Senator Stevens is in the same situation, and he may have to mop up after we get through giving it our best effort, but we can't come up with the $292 in spending authority for the budget authority on defense and still meet the $279 on outlays. It is impossible. Those two numbers don't go together.

The President hasn't taken it seriously on outlays, and the Budget Committee conference didn't take it seriously on outlays, and now we are having to figure out how to do it. So the result of it is unless we play smoke and mirrors, unless we get into the gimmick game, which I don't want to do; I think that is really basically fraud on the American people. We are going to have to cut that budget authority number, and we are going to have to cut defense much more than people have anticipated in order to meet that outlay number.

I throw that up both as a question and also an observation that when we get down to the sequester process, whoever does, and your OMB would have that, if they play the same kind of games with sequester that they have played with the submission of the budget, then what we are going to have is a sequester that still doesn't meet the goals, because they can easily play a game of saying, "We anticipate if you cut budget authority one dollar, you will cut outlays one dollar," and that isn't going to happen.

So we can have this whole thing thrown into complete chaos by simply fenagling with the numbers over at OMB.

There is a way that we can address that problem, as one who supported your overall effort as an unpleasant but best alternative. I say I am looking for an answer.

Senator **Hollings**. Your question, and/or observation is right on target. I observed the same in the markup of the budget conference. I was a member of it and voted against the budget, both in the budget conference report and on the floor of the Senate, pointing this out. Your colleague, Senator Glenn, pointed it out that same evening that we were on the floor, opposing and voting against the adoption of the budget conference report.

We've got a real problem. You know, Gramm-Rudman-Hollings just didn't correct all the ills, and we didn't discipline Cap Weinberger and the way he spends out. As a result, there is no confidence, and the only answer that could be given by our budget colleagues is, well, if they are really in a jam, then, we have fenced the money over there. They can get $6 billion more by putting up the revenues for it. That was the alternative way the budget was reported and adopted by both Houses.

But I would plead with you: Let's not try to fix that problem here. If you can, I would vote for it; don't misunderstand me. But let's just try to fix our tire again and not go back into the upholstery, because I don't see how you are going to correct it.

We've just got a difference between budget authority and outlays. It has never been straightened out, and I know of no one in Congress who has confidence in the numbers or who can tell you exactly how much money is over there. If you can tell me, I would be happy to talk with you. I can't figure that out.

Senator NUNN. Cap hasn't let me in on it.

Senator HOLLINGS. He hasn't let me in on it, or anything else of that kind. It is hard on all of us interested in a strong defense, because he has eroded our confidence in dealing with our colleagues and everybody else. Money is backed up over there and nobody knows how much there is.

Senator STEVENS. Would the Senator yield?

I don't disagree with the Senator from Georgia, but I think that is an unfair characterization of what is going on at the Department of Defense. I spent the last recess traveling around the West looking at production facilities. What is happening is that defense production units of our industry are producing faster now than they did before. They are actually delivering these units of production to the Department of Defense for payment far ahead of what we estimated 18 months ago could happen. And as a consequence, the bills are becoming due and the Department of Defense is paying for equipment and production that was ordered. It was authorized, but it is just being delivered sooner. What is happening is that the industry wants to get in on getting paid now because they think the defense budget is going down.

Senator NUNN. Would the Senator yield on that? I agree with that. I am not suggesting that there has been, necessarily been a monkeying with the figures. What I am suggesting is that we are now in the business of measuring defense outlays, and that is where we are judging the deficit, and that is what is driving Gramm-Rudman Hollings, and that is the key point.

But as the Senator observed, nobody can measure those outlays accurately, and the record on being able to measure defense outlays is very, very bad.

Senator HOLLINGS. And that preceded Gramm-Rudman-Hollings; you and I both know that.

Senator NUNN. Absolutely, but before Gramm-Rudman-Hollings, again as a supporter, we didn't measure that; we didn't pay that much attention to outlays. We let those flow as they might flow. We measured budget authority.

Senator RUDMAN. Mr. Chairman, I wonder if the Senator would yield. I will give him a 30-second answer. I am trying to get through the bill here; I asked a staff member to get to the right page. I wanted to remind everybody that in Gramm-Rudman-

Hollings, as passed and signed by the President and present law, on the sequester order as it regards defense, you will find in the bill, and I will have the language in a moment, in the existing bill, that historical outlay and budget authority ratios and proportions must be used by the Director of OMB in calculating the sequestration. That is part of the law that we passed.

Now, that doesn't fully answer the question and the problem posed by the Senator from Georgia, but I did want to point out that to the extent we could do that, we have already done it. That does not solve the whole problem, but that is in the present law, something that many people are unaware of.

Senator NUNN. I agree you tried to address it, but the problem is that the historical patterns are not accurate to what is happening now.

Senator RUDMAN. That well may be.

Senator NUNN. We deviated from that historical pattern very substantially, because we had a very large change of budget authority over the last several years.

Senator GRAMM. If I might respond, Senator Nunn, when I first came to the House, I was always amazed that every time we talked about the budget, we talked about outlays for everything else, where there is also some uncertainty with regard to spendout rates—some areas of spendout rates are slower—but we always talked about B.A. in relation to defense.

I would submit that there are no stronger group of defense advocates in the Congress or the country than we have in this room. But ultimately, we had to come down to dealing with outlays, and I think we are going to have a tough year of transition, but we have basically played fast and loose with the figures between outlay and B.A., and this year, it finally caught up with us, and it had to do it. We keep committing to these huge systems for the future, but we know we are not going to be able to pay for them.

Senator NUNN. You are right.

Chairman ROTH. Thank you, gentlemen. I don't want to interrupt, but we do have a number of additional witnesses. We appreciate your time.

Before I call forward the next witnesses, I would like to include two statements in the record, one from Senator Glenn and one from Senator Durenberger.

[The opening statements of Senators Glenn and Durenberger follow:]

OPENING STATEMENT OF SENATOR GLENN

Mr. Chairman, I commend you for providing this opportunity to take another close look at the Gramm-Rudman law.

The Supreme Court decision made parts of that law unconstitutional, and we should re-examine Gramm-Rudman for that reason alone. But we should be thankful to the Supreme Court for having made this hearing necessary, for this reason:

With all due respect for the sincerity of its authors, in my view, Gramm-Rudman was, and is, terrible legislation. By passing Gramm-Rudman, Congress added insult to injury in its feeble attempts to balance the budget. What we did was to say, "We can't balance the budget ourselves, and so we'll hand the job over to a fw economic forecasters and a computer." We also placed fiscal policy on hold for five years, and let a formula—rather than human judgment—decide how big or small the deficit should be regardless of other economic conditions.

Mr. Chairman, I frankly worry about what this does to our system of government. We were sent to Washington to make the very choices that Gramm-Rudman takes away from us. Is this really the way to run the country? To me, at least, this makes a mockery of representative government? It says that we have reached the point where we simply do not know how to allocate our national resources, and will not do the job we were elected to do.

Nor do I accept the argument that Gramm-Rudman was necessary. During the debate on Gramm-Rudman I offered an amendment that provides an alternative. It placed the responsibility for budget discipline where it belongs: with the President. The amendment said that the President must either offer a balanced budget or give us the information on how to get there. Unlike Gramm-Rudman, my amendment went beyond 1991. It imposed a permanent requirement on the President.

Why the President? The President is the person who initiates the budget process, and it is here that the initial responsibility for exercising budget discipline lies. The job of Congress is to work from the President's proposal and fashion a budget that reflects congressional priorities.

Over the years, Congress has performed its job well. In fact, for the five completed fiscal years of the Reagan Administration, Congress has actually appropriated three billion dollars less than what the President asked for. Mr. Chairman, I would like to insert into the record at this point a table, prepared by then Joint Economic Committee, showing the Presidential requests under each of the 13 appropriations bills, and the amounts appropriated by Congress, for fiscal years 1982 through 1986. Those who try to pin our budget deficits on Congress, therefore, are simply wrong. They should look at the other end of Pennsylvania Avenue, where we have a President who has proposed the largest deficits in history, and who, in six brief years in office, has more than doubled the national debt.

PRESIDENTIAL APPROPRIATIONS REQUESTS COMPARED WITH CONGRESSIONAL ACTION BY FISCAL YEAR

[Includes amounts requested in appropriations bills only]

	Presidential request	Congress approved
1986	$574.6	$568.6
1985	583.0	566.4
1984	532.8	536.6
1983	497.9	510.8
1982	459.6	462.2
Total	2,647.9	2,644.6

Source: Joint Economic Committee.

Mr. Chairman, I intend to re-introduce my amendment when the debt ceiling legislation is brought to the floor. It will bring fiscal discipline to the right place. In the meantime, however, we are left with current law—Gramm-Rudman. Let me just make a few remarks about proposals to amend this law.

I believe it would be a step backwards either to change the removal powers of the Congress and the President regarding the Comptroller General, or to invest the Office of Management and Budget with additional powers over Gramm-Rudman cutbacks. The former course would damage the unique and objective relationship that GAO maintains with its client organization, the U.S. Congress. Over the years, GAO has performed numerous audits of executive branch agencies and at times has uncovered facts, and wasteful expenditures, that are embarrassing at the least and sometimes even have criminal implications. Any agency performing this delicate and important task must have absolute independence from the branch of government that it examines.

With regard to investing the Office of Management and Budget with additional sequestration authority, I again urge caution. The OMB is situated within the Executive Office of the President and has substantial leeway for imposing its judgment on budget proposals. Whatever the Congress sends the President with regard to Gramm-Rudman cutbacks must be explicit enough that OMB cannot substitute its own view of how, and where, the cutbacks will be allocated. Otherwise, this arrangement will deteriorate into giving the President an effective line-item veto.

Let us remember that Congress has a better record on fiscal responsibility over the past 5 years than the President. Our differences with the President have centered more about spending priorities than spending amounts. I see no purpose, therefore, in giving the executive branch additional authority in deciding where Gramm-Rudman cutbacks will fall.

There may be a valid need to re-examine the impacts the Court's decision could have on certain functions that GAO and the Comptroller General currently perform. However, I caution this Committee that any "quick fix" legislation may have far graver effects over the long haul. I don't want to see Gramm-Rudman revived at the expense of GAO.

In conclusion, if it's broke and it ain't worth fixin', why bother.

OPENING STATEMENT OF SENATOR DURENBERGER

Thank you Mr. Chairman. I am happy that the Committee members have taken time out of their busy schedules to pause for a moment and critically consider the Supreme Court's ruling in *Bowsher* v. *Synar*. The issues raised by that ruling and their implications both for the deficit reduction procedure and for the General Accounting Office are very important and extremely complex. They deserve our close examination today.

When Gramm-Rudman was originally drafted it contained a fallback procedure which anticipated the possibility that the General Accounting Office's role in the sequestration process might be unconstitutional. That fallback would have required Congress to vote on the cuts needed to meet deficit reduction targets—to actually take a stand on where the cuts were to be made rather than rely on an automatic mechanism which dilutes responsibility.

I supported that fallback and hoped that we might one day have a chance to see it in action. I believe it is our responsibility to make the necessary cuts. We should not abdicate that responsibility.

As the same time, I understand the concern of my colleagues that the fallback mechanism would create uncertainty and induce Congress and the President to delay facing up to the deficit. An automatic process may allow Congress to transfer some of its responsibility, but it also forces us to meet our goals.

And that's what Gramm-Rudman-Hollings was all about—meeting our goals. One way or another, this Congress is going to reduce the deficit. If we cannot agree, then a mechanism we created ourselves will do the job for us.

This hearing is also about meeting our goals. The goal in this case is to figure out a way to "fix" Gramm-Rudman-Hollings—to fix the automatic triggering mechanism so that it will pass constitutional muster. There are many ways we can do it. The combinations and permutations seem endless—let's give GAO to the President, let's make GAO independent of everyone, let's eliminate GAO from the sequestration loop . . . all of these are interesting options and all deserve our consideration.

I am particularly interested in the proposal being articulated by Senators Gramm, Rudman and Hollings which leaves intact the initial sequence of reports from CBO and OMB to GAO and then requires that OMB issue the final sequestration report based on those GAO recommendations. Though this approach has sparked concern that too much power is granted to OMB—an agency which has an unsavory a reputation for "cooking the books"—

I think such criticism may exaggerate the ability of OMB to act unilaterally.

First, OMB is required to state its recommendations at the beginning of the process. It must go on the record at the outset. The GAO is then given the opportunity to critique the initial report and to recommend critical changes in the sequestration numbers. Such a mechanism clearly puts the burden on OMB to explain any divergence from the GAO recommendations when it issues its sequestration report.

Second, the Comptroller General may challenge improper sequestration orders in court. Again, there is pressure on OMB to use valid assumptions and keep a clean set of books.

Finally, Gramm-Rudman-Hollings already inludes of number of controls which restrict the ability of the Director of OMB to operate unilaterally.

The end result of these provisions is to circumscribe the arena in which OMB may act. Their effect is to ensure that OMB may not use its sequestration authority to achieve policy ends not approved by Congress. I can only thank David Stockman for providing us with an understanding of what needs to be done.

I look forward to the testimony on this option and on other possible mechanisms for restructuring the triggering mechansm.

The *Bowsher* v. *Synar* decision also raised another problem by calling into question many of the other functions now assigned to GAO. While the Gramm-Rudman-Hollings proposal would not deal with this problem, some of the other options would.

The proposals that have been put forth to address the problem with GAO must be evaluated carefully. While I understand the need to preserve the right of GAO to carry out functions Congress has assigned to it, I am very concerned that any move we make will not undermine the role of GAO as a watchdog. We cannot afford to solve one problem and create an even worse one in its stead.

Again, I look forward to the testimony and discussions with the witnesses on this issue and I hope that the Senate will not act precipitously when it considers options to remedy GAO.

Chairman Roth. At this time, I call forward, Hon. Charles Bowsher, the Comptroller General, and Milton Socolar, Special Assistant to the Comptroller General.

TESTIMONY OF HON. CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, ACCOMPANIED BY MILTON J. SOCOLAR, SPECIAL ASSISTANT TO THE COMPTROLLER GENERAL

Chairman Roth. Gentlemen, we are very glad to have you here today. Please proceed.

Mr. Bowsher. Thank you, Mr. Chairman. I believe that many of the issues that I have in my prepared statement[1] have been discussed this morning, and so what I would like to do is just give you a very quick summary of some of the issues as we see them coming out of the Supreme Court decision.

The first thing to say is that it did take GAO out of this automatic trigger role that we had been put into in the original legislation. The court provided for the fallback position, the position that we would recommend for the Congress to consider, so that the Congress would make the decision.

Under that backup role, GAO can certainly audit and review the numbers in an advisory role to the Congress, as we do in so many other areas.

If it is deemed advisable to have an automatic trigger mechanism in the process, why, we think there are two or three alternatives that could be considered.

One is the changing of the 1921 act, which was considered earlier. I am very pleased that all of the witnesses today, and you, Mr. Chairman, have been a strong supporter of this act. Changing the act would not be the right way to go. I think the role that GAO plays historically in advising the Congress and auditing the executive branch, with a great deal of independence—which is what the original framers of the 1921 act had in mind—is absolutely essential. That is where a very high percent of our work is and has been for many, many years. So we would like to keep it that way, and we would like to continue to serve the Congress as we have in this audit and program evaluation.

A second idea might well be the independent board or commission, somewhat patterned after the Emergency Financial Control Board in New York City or the Chrysler Loan Board. You have reduced that idea, I think today, down to one person, namely myself.

I want you to know, I am not volunteering for that added duty.

Chairman Roth. Will you serve if drafted?

---

[1] See p. 87 for Mr. Bowsher's prepared statement.

Mr. **Bowsher**. If drafted, that is right, but I think a commission might well give it a broader base and give us all more expertise, not only the 5,000 people at GAO; maybe the staff of the Federal Reserve or some other group like that could back up one of the other members as it did the Chrysler Loan Board.

The third, of course, would be Gramm-Rudman II, which has been put forth, and that satisfies the separation of powers situation by moving the automatic trigger mechanism over to OMB in the executive branch.

We would like to make one fairly technical suggestion on that piece of legislation, and that is in the original legislation. When we issued the order, we were asked, then, also to calculate, by all the B.A. structure, namely, 700 and something odd accounts, what that would do to all the accounts.

We think that, if Gramm-Rudman II is adopted, as it is now presently drafted, the action should be moved over to OMB, because all that calculation shouldn't really be done until the final order, as I think the original intent was, and so we would recommend that change.

We would certainly, in that Gramm-Rudman II, play the role of reviewing the numbers and advising both the Congress and the executive branch as to our view of the CBO-OMB numbers and assumptions, and we think we can do that job well. We did it in January; we think we can do it again quite well.

Mr. Chairman, rather than continue with any more detailed presentation, I think it would be better if I opened it up to you and the members of the committee for questions.

Chairman **Roth**. Thank you, Mr. Bowsher, for your testimony. You have heard the discussion earlier about the discretionary power that was initially given to the Comptroller General; under the revision that it be given to OMB. I wonder if you would care to comment. Is this clerical, or is it a pretty extensive economic forecast requirement?

Mr. **Bowsher**. It is quite different than it was in January on economic forecasts. In other words, you are actually forecasting what the number is that has to be sequestered. Therefore, there is quite a bit of discretion there, I think, that wasn't. But there is no question that if we were reviewing it, if CBO was reviewing it, that that would, I think, tend to hold, hopefully, OMB's ability to go beyond what would be prudent.

Of course, that is the way we looked at it last January. In other words, we did not want to do anything that was not properly justified, and we had a good working relationship with OMB and CBO last January. We did the thing, and so if it could work as well this time around as it did then, why, I don't think you would have too much trouble. The issue, though, I think that Senator Chiles brought up is a very good and important one, and that is, everyone knew that GAO was going to look at those numbers, and when the budget came over in January, some of the things that we had been able to iron out—like the spendout rates in defense—turned out to be much more contentious.

So I don't know how it will work, to be very honest with you. It worked well in January. I would hope it would work well again this time around.

Chairman Roth. I would like to turn for a few minutes to the broader question, and that is what happens to General Accounting Office under the Supreme Court ruling. Let me make sure that I understand on your basic testimony. It is your recommendation, your first recommendation, that we leave the Gramm-Rudman law as is and depend on the backup provision?

Mr. Bowsher. That would be our recommendation; yes, Mr. Chairman.

Chairman Roth. With respect to the more general problem, if Congress does nothing, isn't there a danger that all of the noninvestigatory, nonlegislative powers of GAO would be challenged?

Mr. Bowsher. There will be some challenges, I suspect, on some of those issues, and there is no question, as Senator Rudman and, I believe, Senator Chiles pointed out. We have submitted to the committee a fairly detailed list, a very detailed list, as a matter of fact, of the other roles that have to be considered, you might say, as a result of the Supreme Court decision.

I think they fall into two categories, and I would like to speak to those two categories. One is the comptrollership functions, and many of those go back to the 1921 act, when we took away from Treasury some of the functions that the Treasury and executive branch did at that time.

Now, I believe, and I know, Mr. Chairman, you have heard me many times, and other members of the committee have heard, too, that the Federal Government today does not have the financial management system that it should have to run a trillion-dollar budget and operation here, and so I think that some of the things that we have on that list have to be considered.

But I think also what we have got to consider here is how to strengthen the overall budgeting and accounting system of the Federal Government, and I think that is going to take a few months although we have given it a lot of thought.

I have met with OMB since the day I came into office, practically, and I could never get David Stockman to meet and see what we could do to strengthen these functions, both in the executive branch and in the role that we play.

I think there are some functions that we play and have played that could be moved over to the executive branch. But I don't think it makes any sense to move it over there unless the executive branch is willing to build a modern budget and accounting system and to know where the funds are. I think this debate that goes on here about the spending rates of the Defense Department is so typical of the debates that go on in the Government today which use up all the time.

In other words, instead of looking at the programs and what programs should be cut, most people are debating what the numbers are.

I have testified this past year before the House and the Senate on this inflation dividend at defense, and the defense witnesses come over, time and time again, and say, "Mr. Chairman," whichever committee it is, "We can't change" or, "We don't think we should change the accounting system at the Department of Defense. It is doing well as it is."

It is a joke. [Laughter.]

In other words, we have had our standards out there since 1950. We have never been able to approve the Department of Defense accounting systems. My predecessor Elmer Staats, who is going to be one of your witnesses later on, tried very hard, and he even had agreements from some of the Secretaries of Defense. But here we are, 35 years later, still looking at accounting systems that have never been approved. So I would like to take these comptrollership functions and I work with the Congress, the Treasury, and OMB. Hopefully, we could come up, maybe next January or February when the Congress comes back, and lay before you some plans as to what we think should be done to not only correct some of the problems that have been highlighted by the Supreme Court decision, but to give the U.S. Federal Government a budget and accounting system that will help you get on top of these large budget deficits and the large programs that are in the Federal budget.

The second area is the bid protest, which we have done, as Senator Cohen pointed out, since the 1920's. The Congress passed the Competition in Contracting Act a couple of years ago and, in doing so, gave us some features there that would tend to be somewhat executive. They are not the major features. In other words, the major features of our bid protest are still advisory. So as the cases come through the courts, we have been held to be constitutional each time.

Now, the Justice Department has asked for a rehearing in light of the Gramm-Rudman decision. We suspect we will have a rehearing, but we are not sure. That will be ruled on. I think one thing should be kept in mind, that the lower court decision, the *Scalia* decision, was already known to the lower court. The issue that Justice Burger decided and the majority opinion was very close to the *Scalia* decision.

So we and our lawyers feel that we still have a good chance of having all or a good part of the bid protest procedures being ruled constitutional. What we propose is that we just wait to see how that is ruled as it comes through the courts, because it is quite a way down the line now.

Chairman Roth. Don't we run the risk, though, of your authority being challenged through the system itself?

Mr. Bowsher. I think in that area, it definitely has been challenged, and we are in the courts now. In the other areas, on some of the comptrollership functions, I would hope that the executive branch would hold off and not do the challenging and see if we can't work up what I think is needed and has been needed for many years now, and that is a much more strengthened comptrollership function in the executive branch.

Chairman Roth. Have you and your attorneys given any thought to the proposal that the power of Congress to remove the Comptroller General be eliminated? If so, what is that?

Mr. Bowsher. Yes, we have given that a great deal of thought, as you mention, Mr. Chairman, and we do not recommend it. Our bottom line is we would like to see the 1921 act remain as it is. We think it has worked well for 65 years. We feel when we were given this additional duty by Gramm-Rudman, it brought into questioning whether that role was so substantial and that it violated the separation of power, and that's the way the court came out on the removal feature. But we basically would like to keep the act as it is.

As I point out, it has given us the independence to do the reviews of the programs and the operations of the executive department. We also think it has been a very key part of our ability as an organization to develop, to grow, to become more capable, to attract the people that we do attract to the GAO, and to issue these reports on very tough and very sensitive issues.

Many times, people have pointed out to me the Librarian of Congress and other people do not have that kind of protection, but I point out to them that their office and their staffs do not have to go out and review the defense weapon systems, the welfare programs, the organizations and whether a Cabinet officer can spend this kind of money or not. That is the kind of tough assignments we get, one after the other, week after week, and we are working on about 1,000 jobs or reports at any one time. We issue about 500 or 600 reports.

I think anybody who just reads the newspapers knows that that list of reports is a pretty sensitive group of reports, year in and year out.

Chairman ROTH. Senator Rudman?

Senator RUDMAN. Thank you very much, Mr. Chairman. If there was ever proof needed that the Comptroller and the chairman and his counterpart in the House are probably right about not giving the President removal power over the Comptroller, one need only look at the transcript of the Comptroller's statement 5 minutes ago about his opinion of the Defense Department budgeting process. [Laughter.]

I think had we changed the statute, we would probably have a new Comptroller tomorrow, Mr. Chairman. I want to ask the Comptroller, really, just two questions.

No. 1, since a majority of those who have read the decision that we are talking about today are reasonably clear that the Comptroller's executive powers that may have existed no longer exist unless they are agreed to by consent by the Executive, why should the President have any power to appoint the Comptroller, and why should the President have any rule whatsoever in removing the Comptroller?

Why not have the Comptroller General appointed by the Congress exclusively and have him removable by concurrent resolution by the Congress? Why have the President involved at all if, in fact, you have no Executive powers and you want independence?

Mr. BOWSHER. Senator Rudman, that has been raised from time to time, and both my predecessor and myself have always answered it the same way. We feel that, being an Office of the Government, the procedures that have taken place over the years to name the Comptroller General have worked very well, and from time to time, why, we think that the Office should have the ability to consider some of these independent roles. There is no question that this decision brings more into question.

But let me point out that, when I came into office in 1981, I had really only had four predecessors since 1921. In other words, the way that the Comptroller General has been selected and everything about the Office has worked quite well. The GAO has evolved into a much stronger office, and I think that one of the things that the strong men that wrote that original legislation were trying to do, more than anything else, if you read the legislation, was to give it independence, give the Office independence.

So they were trying to craft a way whereby both the Congress and the President had a role in selecting the Comptroller General. Something that is overlooked many times. It is a joint resolution. It requires Presidential action to remove the Comptroller General, and I think that when you look at the history of, now, 65 years, it has worked quite well.

So I think we would be concerned about making that radical of a change to the legislation.

Senator **Rudman**. Don't you really think, though, that although that position I would have agreed with completely up to 4 weeks ago, that since you no longer really probably can enforce much of your Executive power and since the President does have some role in removing you, that really, since you are pretty well established by this case as an independent arm of the Congress, that the Congress ought to decide who they hire and who they fire? Why include the President, is my question.

Mr. **Bowsher**. I think you are aware, Senator, that in 1980, the Congress did change the law somewhat by creating a temporary Commission of five leaders of the House, five leaders of the Senate, and sending three or more names; in 1981, they sent eight more names; the President is not required to select off that list, but it is a strong suggestion, needless to say, Milt, as my Deputy and General Counsel, has looked at these issues, for 30-some years, so maybe I should let him answer.

Senator **Rudman**. I would love to have his answer, but I would like to have your answer for the last 4 weeks, not for the past 29½ years.

Mr. **Socolar**. I understand that, and I would certainly agree with you with regard to the initial impression that comes out of the Supreme Court's decision. I don't think it is at all clear, though, with regard to all of these executive-type functions, that the Supreme Court decision necessarily takes them all away. A number of them, I think, are important to the role of the Comptroller General in rounding out his responsibility toward accountability in government.

As you are well aware, of course, initially, the President was involved because it was considered that those were perfectly all right for the Comptroller General to execute. The situation is, by no means as clear now, and I think our position simply is that it is going to take us some time to go through these functions, to analyze exactly where each of them fits in, rather than come to some hasty conclusion as to how this whole thing should be fixed with regard to the roles of the Comptroller General, let's take our time.

Senator **Rudman**. Let me ask one last question, then, Mr. Chairman, and that would be this: I found your comments most interesting in light of *Ameron* v. *The Army Corps of Engineers*, which is the Third Circuit case, now remanded to the full circuit. I suppose conceivably, if *Ameron* is decided in favor of the Comptroller, the case again ends up before the U.S. Supreme Court. But let's just assume for a moment, as I am assuming, that the case is going to be reversed by the circuit.

Would you have a vastly different view, then, of what you ought to be doing if that happens?

Mr. Socolar. That would certainly impact our thinking a great deal. One more time, though, I would have to say that I don't think what we are dealing with is something we want to rush to a conclusion on.

Senator Rudman [presiding]. I wanted to tailor that. My questions were more exploratory in nature than suggestive, but first, an observation.

You may disagree with this, but I have read the *Bowsher* case very carefully. I have also read *Ameron* fairly carefully. If the circuit and then the Supreme Court can distinguish *Ameron* from *Bowsher* v. *Synar*, and they can decide that you do have the authority as the third circuit said you had originally, which I, by the way, agreed with, obviously—continuing to have a very high opinion of Justices Blackmun and White—but if, in fact, the courts could rule for you in that case and hold to their decision in *Bowsher* v. *Synar*, then they are truly miracle workers.

I do not believe that it is possible, under the rationale of the majority in the *Bowsher* v. *Synar* case, to do anything but to overrule the third circuit or more likely, the third circuit will reverse itself. I am simply saying, if that happens, I think that really brings clearly into focus a whole number of things that really, the Congress is going to have to deal with and you are going to have to deal with. That is aside from what we are here about this morning, but I think it is very important, and we don't have you here that often.

Mr. Bowsher. We are more than willing to look at that, needless to say, as the court decisions come down, but I think as Milton pointed out, we would very much not like to do it in haste before we hear what the court does say in that case, and also, as I say, I think some of these issues are not just a listing of details or anything like that.

I think you have got some bigger problems here in the Federal Government, and I would like to see those addressed in an approach other than just a quick fix to what might be viewed as constitutional problems.

Senator Rudman. Thank you very much. Obviously, I leave it to the leadership of this committee and its counterpart in the House to wrestle with this problem. I believe that if the *Ameron* case is decided as I expect it will be at some point, then quite frankly, we really have to go back to the drawing board to decide what to do.

The Hobson's choice that we have here is that, it is clear in my mind, if that is the way the case is decided, the Executive powers cannot be constituted in GAO without doing what nobody wants to do—and I guess I am one of those who doesn't want to do it, either—to give the President authority of removal of the Comptroller. In that case, I am not sure we can fix it. We just may have to live with the reality that those may be the less important powers of the Comptroller and that may be the lesser of the power of elves. But I thank you very much for your testimony, and I thank you very much, Mr. Chairman.

Chairman Roth. Senator Eagleton?

Senator Eagleton. Thank you. Let me state in brief, Mr. Chairman, that I am totally opposed to making the Comptroller General a complete and total creature of the President of the United States.

I have now a few questions for Mr. Bowsher. What, if any, preparations are you making for a sequestration order if needed in fiscal 1987?

Mr. Bowsher. We are making preparations and have been for a number of weeks now to do a review of the CBO report, and if we are in the process, why, we will be ready to carry that out. So we have been looking at the economic assumptions. We have been asking our teams to look into what we think are the more significant issues, and we will be ready.

Senator Eagleton. Does that mean that you are in the process of formulating a sequestration order, if needed, for fiscal 1987?

Mr. Bowsher. We could do that; but, in all probability, our role here is going to be more advisory this time around because if you go to the fallback position, the sequester order would be voted by Congress. If you go the Gramm-Rudman II process, the order itself will be issued by OMB.

Senator Eagleton. So you are going to have some advisory input?

Mr. Bowsher. Right, and it will be very similar to our review, you might say, of the numbers in the January of fiscal year 1986 review.

Senator Eagleton. Step two, what will the joint committee, under its fallback provision, use as a basis for deciding how big a deficit reduction we need in fiscal year 1987, and how it should be allocated? They will use you and what else?

Mr. Bowsher. Well, they would have the joint report, you might say, from the CBO and OMB; and those would be the main inputs, I think.

Senator Eagleton. Let me suggest a version of a "fix" of Gramm-Rudman for your comments. Everything has got to have a label, you know, so I am going to call this one the "semi-automatic cut." It would work as follows: I would appreciate if you would follow it. I am going to have to go back to Foreign Relations. Is Mr. Miller here? Is he going to be the next witness?

Chairman Roth. Yes, he will be the next witness.

Senator Eagleton. Would you, Mr. Chairman, ask, in my absence, if I am not back, Mr. Miller for Mr. Miller's comment on this same question, and I will hand it to your staff. I would appreciate it if you would.

Chairman Roth. I would be happy to.

Senator Eagleton. All right. Here is how I envision this working. First, the Comptroller General would draft the sequestration order in exactly the same manner now provided under Gramm-Rudman-Hollings, exactly the same as before the Supreme Court, OK?

Mr. Bowsher. Yes.

Senator Eagleton. Second, rather than presenting the order directly to the President, as he did heretofore under that act, this amendment would require, instead, that it would be submitted simultaneously to both Houses for ratification, as it were, an implementing vote, and then presented to the President for his signature.

The process will take place no later than 3 legislative days after the draft order is received. There would be no amendments; it would be a privileged matter; there would be 1 hour of debate. If the President should veto, a similar expedited schedule; it would apply to the veto override.

Now, for giving my reasons, I will just rephrase it another way. It would be old Gramm-Rudman, and with one other intervening step: A vote of ratification by both Houses of Congress, the "Good Housekeeping Seal of Approval"; yes or no; take it or leave it; no amendments; there it is; and rush it off to the White House.

This procedure avoids giving extraordinary budget power to the administration, which some say is only a small step short of a line-item veto. Second, under this proposal, Congress would be acting more or less like a notary public, putting a legal seal on the sequestration document, and in a sense, the President would have a somewhat similar vote, a no vote for a veto would put a heavy political burden of explanation on those who voted no.

The only issue involved is whether or not to actually implement the agreed upon Gramm-Rudman-Hollings budget cuts or whether to adopt the Bowsher figures. Third, a vote to ratify an objectively arrived at sequestration order from GAO is politically more palatable than votes on a congressionally and, hence, politically initiated joint resolution.

That is, the vote on the numbers would be a vote to make, to ratify the numbers, the Bowsher numbers; shoot them off to the White House for his veto. It would satisfy from the constitutional point of view, because it would have the formal approval of the Congress. It would satisfy the Supreme Court's decision.

So there is a, I will call it the semi-automatic fix. What do you think of something like that?

Mr. **Bowsher**. Well, I think that would work. In other words, I think that if you could get the Congress to vote it, I think that it would work, and the constitutional problems would be overcome, no question about it.

And we could do it. We did it in January; we could do it again at this point in time, I believe, and it is a straightforward system. So it is very much like the backup position.

Senator **Eagleton**. It is somewhat like the backup position.

Mr. **Bowsher**. Somewhat. It takes the joint committee out of the picture, right?

Senator **Eagleton**. Right, and insists a vote of ratification on your numbers. It just stamps your numbers, very quickly, very rapidly; it is settled.

So it takes, quite frankly, some of the political onus and some of the political sweat out of the current backup provision, and we are all political creatures around here. If you can take out some political sweat, some political grief and some political agony, if you can strip out some of that, that makes it nicer for us politicians, and that is what I am trying to do.

Mr. **Bowsher**. I think it has one more advantage, too, and that is that it allows the Congress to act after they have seen the numbers. In other words, I have often been asked the question, "What is your opinion of the Gramm-Rudman process?" And I have often answered this way, always answered this way, and that is that I think it has the virtue of trying to get the budget deficit, which is serious, and I think we need some kind of process to get at it; I think it has the virtue of hitting everybody.

In other words, one of the problems with budget reduction systems in the past or budget reduction efforts is that you build up one area of government and you reduce the other area. Gramm-Rudman says everybody pretty much has to take an across-the-board cut, and I think that is good.

A couple of areas that I worry a great deal about is whether it leaves you with a very inefficient government. In other words, if you had to take large sequesters and the process up front doesn't enforce a more coherent budget reduction solution, then you start to cut at your operations across the board; lots of times you shouldn't be doing that in an organization.

I have an additional worry here and that is that, as our economists look at it—and we just had our economic panel of outside experts in on Monday of this week—why, the revenues might be deteriorating here just because the economy is not strong. We might be looking at, in fiscal year 1987, a fairly large sequester, maybe larger than most people are thinking about.

I think, also, if you think of fiscal year 1988, where you won't have the one-time benefits that we have had this year of a big drop in interest rates, a big drop in oil prices, and maybe a windfall in the taxes that might eventually be used, you have got to get down to $101 billion. So unless the President and the leaders of Congress can come together and make a budget for the fiscal year that hits within the targeted figure, you then are driving that truck over the cliff with a big sequester.

I think your proposal and the backup proposal that is in the existing legislation has one big redeeming feature, and that is it doesn't automatically put that sequester into being unless it is looked at. I think that the numbers this year might be a little larger than what people are considering, so it would be another reason why I think that either of those two procedures ought to be given quite a bit of consideration.

Senator EAGLETON. Thank you, Mr. Chairman.

Chairman ROTH. Thank you, Senator Eagleton.

Let me just make two comments. One of my concerns with Gramm-Rudman is that as it was ultimately reported out of conference, it did not treat all programs equally. I think that is——

Mr. BOWSHER. I should have said all organizations pretty much. You are right. Some of the programs are exempt, no question about it.

Chairman ROTH. I think that was a serious error.

Mr. BOWSHER. Yes.

Chairman ROTH. Second, as one who thinks Congress ought to have the courage to vote, I am not persuaded that the second proposal or the proposal of Senator Eagleton will eliminate that much political heat. I don't know. I mean, I think the whole thrust of Gramm-Rudman is that to work, that it is a gun at the head of Congress, and I fear that the modification will not take the heat off, and consequently, will not be effective.

But if I understand what you are saying, in a very real sense, is that maybe it is overambitious if the economy is down, because we may be cutting spending to a point where it is counterproductive in a real sense; is that correct?

Mr. BOWSHER. That is very true, Mr. Chairman. In fact, what I showed our outside economists was the page out of the CBO's testimony of a few weeks ago where it showed the deficit, excess deficit level going up $10, $20, $30 billion that would be over the $144 billion; it then shows the percentage cuts that would have to be effected against the defense programs and the nondefense programs. Looking at their numbers, they got awfully concerned that the cuts that would be required in the Federal Government budget, if a sequester had to be adopted, would do a great deal of damage to the economy at this point in time, if the economy is slowing down.

So they expressed a great deal of concern on this issue.

Chairman ROTH. One final question. The Comptroller General has been characterized as someone independent of both the President and the Congress. Yet the Supreme Court found he is an agent of the Congress. Do you want to be an agent of the Congress, or do you want to be independent of the Congress?

Mr. BOWSHER. Well, I think that what the framers of the 1921 act were trying to do was just that, to make it independent of the executive branch and the Congress. But if you read the history, and I think it was pointed out in the Court's decision, that the main concern was making us independent of the executive branch or of the President.

I think if you remember back when President Cleveland made the famous statement, which isn't too much different than the one that Senator Rudman made here just a minute ago, President Cleveland said, if the function was in Treasury and he couldn't change a certain account over there, he could certainly change the Comptroller. It was with that background that the Congress was very, very concerned about setting this Office up with as much independence as possible, and primarily from the executive branch.

I think when we do our work with the Congress, we have to be independent there, too. In other words, we take a fairly high percent of our work from the committees at their suggestions, but within plan. We have a very elaborate planning process, and most of the work that we do get from the Congress fits within our plans, but we have got to be able to do our work in an independent fashion and to issue the reports to the Congress as objectively as we can do them.

We have a very vigorous review process that looks at the evidence that our teams have collected, the recommendations they have come up with. They have to make sure that the recommendations are supported by the evidence, and so we have a very, very elaborate process. Sometimes people worry that it hurts the timeliness of our reports, but we don't want to issue any reports that are not objective and are not based on independent work.

That is really how we operate, and 90 to 95 percent of our work is doing those reports for the Congress.

Milt, do you want to add anything to this?

Mr. SOCOLAR. No, except to say, to emphasize, really, what you have said, and that is that the important thing is that we be able to report on the things that we looked at objectively and without any constraints on what it is we have to say after doing that work, and in that sense, we really need to be independent of both the executive and the legislative branches.

Chairman ROTH. If we do nothing will that ability continue?

Mr. BOWSHER. We believe it will, Mr. Chairman. I think in some of these areas, as Milt says, it rounds off some of our power and maybe some of the image of our organization. We are like disbursing officers; throughout the thing will not be quite as finite as it has been in the past, but we would hope that the bulk of our work in the reports would be definitely just as independent in the past, no question about it.

Chairman ROTH. Gentlemen, I appreciate your being here. We may have some additional questions, so the record will be held open for 5 days. I would ask that if we do, if you could return them as promptly as possible, because they may be important in this process.

Mr. BOWSHER. We will, Mr. Chairman. I would just like to point out one other thing to you and to the committee here, and that is that my distinguished predecessor, Elmer Staats, is here today.

He will be a witness before you. We have often talked about these issues since the Gramm-Rudman process has come up. He, I, and Milt—who held the Office for 6 months after Elmer went out and when I came in—think the very best thing is to keep the 1921 act as it is and to do our work for the Congress as we have historically done it.

I am happy to hear today that most people have discarded the idea of moving us over to the executive branch: all three of us would advise against it. That is 20 years of sitting in this chair, you might say.

Chairman ROTH. I would strongly fight any effort to revise your charter as far as executive branch, and I think, I gather that seems to be the sense of the committee.

Mr. BOWSHER. We appreciate that. Thank you.

Chairman ROTH. Thank you very much, gentlemen. At this time, I am very pleased to call forward the former Comptroller General, Elmer Staats, who served with such distinction as Comptroller General, as well as in other capacities.

Mr. Staats, I think you are uniquely qualified to comment on some of the matters before the committee today, and it is always a pleasure to have you here.

TESTIMONY OF ELMER B. STAATS,[2] FORMER COMPTROLLER GENERAL OF THE UNITED STATES

Mr. STAATS. Thank you, Mr. Chairman. I appreciate your invitation. I assume that your reason for inviting me here is because I have experience both in OMB and GAO. I served for more than 20 years in the OMB, 11 of those years as the Deputy Director under four different Presidents. Under Truman, Eisenhower, Kennedy, and Johnson. Since I have left the GAO, I have continued my interest in this subject. I am a member of the board of directors of the

---

[2] See p. 95 for Mr. Staats' prepared statement.

Committee for a Responsible Federal Budget, which, as you know, is cochaired by former Congressmen Robert Giaimo and John Rhodes.

I think what I could perhaps contribute to this dialogue is a little perspective going back over the years, commenting on Supreme Court ruling, which I have read several times with care. I have a few comments to make with respect to some of the points that I didn't feel were adequately emphasized or pointed up in the ruling.

First, it is useful to point out that in 1921, the GAO was created as an independent agency within the Government and it wasn't until 1945 that GAO was identified with the legislative branch. That was done as a matter of convenience for excluding the GAO from the province of Presidential reorganization plans.

In the late 1930's, President Roosevelt submitted a reorganization plan to strip away many of the GAO's functions and to place those functions in the Treasury Department. The Congress rejected that reorganization plan because they thought it would weaken the independence of the GAO.

It is also useful to point out that until recently, the President himself submitted the budget for the GAO as part of the independent office section of the budget, and the independent agency subcommittees of the House and Senate Appropriations Committees reviewed that budget. That has since been changed, but that prevailed until very recently.

I do not think that the court ruling adequately reflected the independent role that the GAO has played over the 65 years. If you read the legislative history of the creation of this Office, it was quite clear that everything was done to try to emphasize the independence of that Office in terms of his appointment, his tenure, the removal authority, the retirement provisions and so on.

In general, the pattern was based on a Federal judgeship, so that the Office was designed to be as independent as you can create an office within the Government. There are several statutes which call on the GAO for assistance, to be sure, but the President likewise has his authority.

I won't read this provision, but it is in section 312(a) of Public Law 13, 67th Congress, which provides specifically that the President has the authority to call on the GAO for studies and audits, as well as the Congress. I am simply mentioning this because it reinforces the idea that the GAO was created as an independent agency.

Over the years, the executive agencies have made a number of suggestions. They made a number of suggestions to me for areas that they thought would be useful for the GAO to look at and make audits and reviews. We obviously wanted to retain our independence as to whether or not we believed they had high priority and whether they would be appropriate.

But we did accept, in many cases, the suggestions made by the executive branch. This gets a little bit at the point that was raised awhile ago as to why the President should be involved in the appointment process at all.

I think he should be, because the GAO must get its information from the executive branch, and it must rely heavily on the executive branch to carry out its recommendations.

I think it would be a mistake to remove the President from this role. I had, in my term, a major increase in the number of requests that we accepted from the Congress. When I went to GAO in 1966, about 8 percent of our work was responding to requests from Congress. When I left, it was about 35 percent.

But we made clear, in all cases, where we accepted recommendations from the Congress to undertake an audit or a review, that the results would have to be our own independent judgment; that is, our findings, conclusions, and recommendations would be independently arrived at, even if we knew the leaning of the Members or the committee that had made the request.

They weren't always happy with what we came up with, but I think overall that the Congress has regarded the independence of the GAO as important and vitally respected as essential to the GAO's integrity and value as a governmental institution.

Any implication from the Supreme Court ruling that the GAO statutory responsibilities to the Congress or the fact that Congress could take the initiatives in his removal weakened the independence of the Comptroller General simply did not accord with the facts as I experienced them. A full appreciation of the independent role of GAO cannot be obtained by a simple reading of the many statutory responsibilities of the GAO. Otherwise it is possible to conclude, as the circuit court concluded, that the GAO is subservient to the Congress.

I do not think that was an accurate understanding of the role of the GAO, at least during the 15 years that I was there. I have been distressed by the media commentary on that ruling that the GAO is, the Comptroller General is an appointee of the Congress, and other references as an employee of the Congress implying that the GAO could not render an independent judgment.

I don't think there is any doubt that the GAO plays an important role in assisting Congress in its oversight responsibilities of the executive branch.

As the Government has become larger and more complex, it is natural that the Congress would turn to GAO for expertise and for detailed studies, but that has not changed the independence and objectivity of the findings and conclusions and recommendations of that Office.

With these comments in mind, I find it difficult to believe that the question of who has the right to take the initiative in the removal of the Comptroller General is really a very serious question. I don't really think that was the issue.

No action of this type has been initiated in 65 years, or even discussed, as far as I am aware. If the President had wanted to see the Comptroller General removed, he could have sponsored a joint resolution to that effect. But he has not done so.

Let's go back to the early days of the GAO, during the Roosevelt administration. The President might well have been successful, because the then Comptroller General was deeply opposed to many of the things that the Roosevelt administration wanted and attempted to find his actions illegal. The President had an overwhelming majority in the Congress. But if he considered the joint resolution approach, he never mentioned it in any public way. That might have been a case where it most likely could have been done, but never undertaken.

The question of whether the Emergency Deficit Control Act of 1985 constituted an unconstitutional delegation of congressional powers, I think, is quite another issue.

The authorization and appropriation of funds to carry out the activities of the Federal Government is, of course, one of the most fundamental responsibilities of the Congress under the Constitution. That issue goes to the very heart of the Gramm-Rudman-Hollings legislation. In my view, this fundamental issue is involved, irrespective of whether the sequestration authority is given to any agency or office, whether located in the legislative or the executive branch.

The President's authority to withhold funds appropriated by the Congress has been clearly spelled out by statutes and has been attested in the court decisions over the past 50 years. There is no precedent for the delegation of the sequestration or similar authority such as that found provided for in the Gramm-Rudman-Hollings legislation.

The single exception of which I am aware was authority given to President Truman at the outset of the Korean war to reduce funds for procurement and construction programs in the amount of $500 million to conserve material and manpower to support the war effort. The clear purpose, however, was not fiscal policy, in this case, but furtherance of our defense program. I am aware of no other instance of this type.

My experience, Mr. Chairman, in the OMB—then called the Bureau of the Budget—was that the Congress was extremely jealous of any discretion given to the Executive, other than the Anti-Deficiency Act. The Anti-Deficiency Act of 1933 was designed to prevent an agency from incurring a deficit in its appropriation during the course of the year. But beyond that, this authority was jealously guarded by the Congress, and there was no willingness to give the Executive the kind of discretion that we are talking about here today.

In summary, I am strongly opposed to the sequestration concept. It is arbitrary and it damages highly essential programs which Congress otherwise would not reduce or eliminate. These judgments historically have been made on a case-by-case, program-by-program basis after careful review of the authorizing and appropriations committees.

I do not believe there is a substitute to this approach. Is Congress willing to give up its constitutional responsibility for appropriating Congress to carry out the statutes enacted by Congress?

Has it examined the far-reaching implications of delegating this responsibility to anyone outside of the Congress? Guidelines, even though tightly drawn, do not solve this problem.

In listening to the discussion this morning, Mr. Chairman, the point is being made that the guidelines are so tight that the OMB would not have much discretion. I would say in response to that if those guidelines are adequate for that purpose, then why doesn't Congress enact the appropriation. In other words, the Executive either has the discretion, or it does not. I don't really quite see the value of the guidelines as solving the basic problem.

In summary, again, I am strongly opposed to the sequestration concept. It is foreign to all that I have experienced in the many years that I have been in the Government.

The Congress has a clear and important responsibility for oversight. I worked closely with the Congress in the 15 years I was Comptroller General in strengthening its oversight role. The executive agencies are clearly accountable to the Congress in carrying out their statutory responsibilities. Isn't there an incompatibility, even an inconsistency, in delegating the decisionmaking as to the fiscal resources available to them for the execution of governmental programs and this oversight responsibility? I believe there is.

In conclusion, I strongly recommend against any change in the statute governing how the Comptroller General is appointed, how he is removed, or in his tenure and retirement. These provisions have been carefully crafted to assure independence and credibility in the Office. They have served the Nation well. If the GAO's greatest asset, its credibility and objectivity, were to be lost or greatly weakened, the Federal Government and the Nation would be the loser.

This completes my statement, Mr. Chairman. I sound like a voice in the wilderness here this morning.

Chairman ROTH. Thank you. I appreciate your decisiveness as to where you stand on these issues. I think that is extremely helpful. Let me say as one Senator, when I said I was looking for the best fix, I don't know whether I am going to support any change or not, but if we do, I think we want to try to do it in the best manner possible so we don't go through this process of having to fix it again sometime later.

I suppose the answer to part of your problem is that is by sequestration, what Congress is really trying to do is shield itself from having to put a specific vote of enforcement and, politically, I think it is not desirable. But the fact is that we haven't been able to do very much about the deficit under existing procedures, and that is the reason for that kind of a process. I voted against it, as you know.

Let me go to the more general question, because I am particularly concerned about the Comptroller General. I think over a long term, that is a more important problem, even though the attention is more directed to Gramm-Rudman. One of the areas I would like you to comment on concerns the GAO's performance of the so-called comptrollership functions, settling claims, accounts, prescribing standard accounting procedures and so on. It has been said that many of these functions are not only important in and of themselves, but they do carry clout, generally, during the audit process.

What is your view of the importance of these so-called comptrollership functions?

Mr. STAATS. I think they are quite important, Mr. Chairman. I have read the Supreme Court decision on that very carefully, and as you have indicated earlier, they did not really take a position, they specifically did not express an opinion with respect to those activities.

They are somewhat different in character, if you go down through the list. Some of them, I think, are really ancillary to the audit function. I call them the extension of the Congress' purse strings functions. They go along with the audit function, settlement of accounts, for example, or the handling of claims.

You could argue, to be sure, that some of them are executive in nature, but what is executive and what is not executive is certainly not a very clear line. It is highly judgmental, and whether the court would rule with respect to any of these in the future as being outside of the domain of the GAO I think you could only speculate about. I think they have to be looked at pretty much case by case as to whether or not they really are an extension of or related to the audit function or whether they are of such a nature such as they found in the case of the sequestration, such importance that they did not think the Comptroller should exercise those activities, those functions.

So I would hope that the outcome would be such that they would not be lost to the GAO and to the Congress, but it is very difficult for me to see them being all lumped in one basket and saying they would all stand or fall simply because of the Gramm-Rudman decision.

Chairman ROTH. I have one further question. What if the Congress deleted the congressional removal provision? I gather from your testimony you don't favor that; that is, making the Comptroller removable only by impeachment.

Mr. STAATS. You indicated in your letter to me that this was one of the various possibilities that was being explored. I have thought about it some. I am not certain, Mr. Chairman, that that would cure the constitutional issue. In reading the Supreme Court ruling, they kept citing the number of statutes where the GAO served the Congress. It is conceivable to me that they might say, "Well, still, GAO is a part of the legislative branch and therefore not capable of performing executive-type functions."

I don't really know. As I said in my statement, I was disappointed in the Supreme Court hinging its whole decision, apparently, or most of the decision, on the grounds of the joint resolution basis for removal. I don't personally see that as an issue. It hasn't been an issue in 65 years. I can't perceive of it becoming an issue.

The real issue here is whether the Congress is willing and finds it constitutional to delegate the appropriations function to any officer outside of the Congress. As I see it, that is the issue. Now, I am not sure that even the proposal of Gramm-Rudman II, if challenged, would be found to be constitutional.

I am not a constitutional lawyer, but I have lived with this issue for a long, long time.

Senator CHILES. You are saying that on the basis of delegation of power?

Mr. STAATS. On the delegation of power.

Chairman ROTH. I think we would all agree that that remains a constitutional issue.

Mr. STAATS. Is the delegation really a delegation of legislative powers? I personally would perceive it that way.

Chairman ROTH. Let me go back to my earlier question and just make two comments. I agree with you; it is not clear cut whether or not it would solve that one aspect of the constitutional problem. Certainly, there were two Justices that indicated that it would not.

As to the others, I guess we would not know until further litigation.

On the other hand, if the removal power has not been used and you have no real consequence, why not remove that possible problem?

Mr. STAATS. I think there is some possibility of that. I certainly would not be against examination of the proposal that you suggest. I reach the conclusion in my statement to leave it alone and not change it. But if it came to the question of whether the Comptroller General should continue to exercise functions of the type which have been exercised and delegated to it by the Congress over the years, I would not be adverse to having that approach considered.

I was a member of the Chrysler Loan Guarantee Board. I was a member of the Loan Guarantee Board to supervise the loan to New York City; many other activities going down through the list that I am sure Mr. Bowsher has given you could be called into question whether they are executive or legislative.

I looked at the Chrysler Loan Guarantee Board as a quasi-judicial activity. We were trying to reach a judgment as to whether the Chrysler Corp. had done everything it could to preserve itself before the Federal Government could extend it a guarantee. I did not see that as an executive function. The other two members were the Secretary of the Treasury and the Chairman of the Federal Reserve Board. I think it would be unfortunate if the situation were to arise where the Congress could not have turned to the Comptroller General to serve in the capacity at that time.

I think there is nothing so clear cut or precise about the division between what is legislative and what is a quasi-judicial function in this Government as you can easily characterize all these functions as executive. This is where I, again, have some trouble with the Supreme Court.

The regulatory bodies have executive functions and they have legislative functions, and they have judicial functions. I have always felt our Constitution ought to be flexible enough so that you did not have to clearly demark what every activity was when Congress decides to create an authority of this type.

I guess some constitutional authorities will now say that a serious question has been raised with respect to these so-called independent agencies.

Chairman ROTH. I appreciate your being here today. We may have some additional questions in the next several days, and we shall look forward in the future to your advice and guidance.

Mr. STAATS. Mr. Chairman, you have questioned other witnesses on this. I would go for the fallback provision, possibly modified along the lines suggested by Senator Stevens or Senator Eagleton. I think if Congress goes down this road of delegating this function to the executive, I have serious doubts about its workability, but more importantly, I think it is a terribly bad precedent.

Bad precedent.

Chairman ROTH. I think the committee will agree with you, Mr. Staats. Thank you very much. It is always a pleasure to have you here.

At this time, we are very happy to call forward Jim Miller of the Office of Management and Budget. I regret that he had to cancel some other engagements, and I also regret that a number of the Senators are no longer here. We have some questions for him for comments from other Senators.

Jim, why don't you put your statement in the record, if you would, and just proceed to comment as you will.

TESTIMONY OF HON. JAMES C. MILLER III,[3] DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

Mr. MILLER. Thank you, Mr. Chairman. I am pleased to be here. Let me just summarize a couple of points here and then get right to the meat of what I think is on the minds of the committee at this point, or what I understand to be on your minds.

The first point I want to make is that the 1986 Gramm-Rudman-Hollings sequester seems to have gone pretty well. The agencies have adjusted pretty well; there are no significant adverse effects on personnel or on the services. However, I think that a sequester for fiscal year 1987 would cause considerable disruption and considerable pain. Along with many in Congress, we in the administration are very hopeful that we can avoid that, that the Congress and the President will work together, and that we will have an appropriations process that will result in our being able to estimate the deficit to be less than the trigger amount, certainly below $154 billion, and hopefully, hit the $144 billion mark.

Second, I would like to make the point that we are going to be issuing the so-called Mid-Session review the first week of August.

The reason for our delay past July 15 is that we were unable to incorporate changes made in the urgent supplemental, and we needed to do that before we make the report. Second, we needed to incorporate the effects of the release of the data of yesterday, the data on the GNP, the revised first quarter, and so forth.

So we do now expect that to be out in the week of August 4. However, that report will be based on some modified Presidential policy or modifications in the President's budget reflecting actions by Congress over the year, maybe a few policy changes at this point, and we will estimate the deficit there. We will also indicate how we would anticipate, as is required by law, how we would anticipate making up the deficit in order to hit the $144 billion target.

A couple of weeks later, on August 20, we will be issuing another report pursuant to Gramm-Rudman-Hollings, but the baseline for that report will be very different from the baseline of the August 4 report. That baseline will be the so-called Gradison baseline, for Bill Gradison in the House. Basically, it says for any appropriated amounts for which there is no appropriation for fiscal 1987, for the full year fiscal 1987, you have to count the amount of the 1986 appropriations.

So as you can see, overall, appropriations for 1986 are less than for 1987, and so just for that reason alone, we would anticipate the number being different.

I just want to alert everybody that you are going to have reports coming out 2 weeks apart and the deficit numbers are going to be different, but they are going to be different primarily because of different baselines and the baselines are written into law, which requires these to be different baselines.

---

[3] See p. 103 for Mr. Miller's prepared statement.

Those are the two points that I wanted to make, and then let me just address one final issue. As you know, Senators Gramm, Rudman, and Hollings have proposed to amend Gramm-Rudman-Hollings by placing ultimate responsibility for the estimates with the Director of the Office of Management and Budget. Specifically, their proposal would continue to have OMB and CBO report to GAO, but rather than having GAO issue the final report to the President, the GAO would now report to OMB, and OMB would then report to the President and Congress. So the Presidential order of sequester would be based on that report.

We support efforts to improve Gramm-Rudman-Hollings in light of the *Synar* decision by the Supreme Court. The promise this law makes to the American people, we feel, should be fulfilled. As we understand the proposed amendment, it would correct the constitutional problem the Supreme Court found.

The final report would be issued by an official serving at the pleasure of the President, namely, the Director of the OMB. Moreover, the Director would not be legally required to use the legislative branch numbers in its final report, either by averaging or otherwise. However, he or she would be subject to the same restraints as the Comptroller General was under the original version of Gramm-Rudman-Hollings.

That really completes my statement, Mr. Chairman, and I will be glad to address any questions that you or your colleagues might have.

Chairman ROTH. Earlier, there was a great deal of discussion on the procedures proposed under Gramm-Rudman II, if enacted, with respect to the discretion that is imposed on OMB.

Let me ask you, to what extent would you feel bound by the advisory opinion from GAO? Under the legislative proposal, OMB is supposed to give due regard to the recommendations of the GAO. At the same time, you are required under the legislation to make your projections of the budget at the first step. There are, sometimes, very broad differences between the executive branch and the Congress or between the Comptroller General as to where the economy is going.

Does it give you any problems if you make one projection at the first stage and then the GAO makes its advisory opinion somewhat differently? Where does that put you as the ultimate arbiter?

Mr. MILLER. Let me say, Mr. Chairman, first of all, I would view my job as a very narrow, technical one of answering the questions: What is the deficit likely to be? That will be based on what the assumptions are about economic growth.

Chairman ROTH. Who makes the assumptions on economic growth?

Mr. MILLER. Under this, I would have to make, draft those assumptions.

Chairman ROTH. Is that a clerical or a very narrow or technical matter?

Mr. MILLER. Well, it is a technical matter, as you indicated, subject to a great deal of differences among experts. I mean, I dare say, if you got 10 economists in a room, you would get different answers.

Chairman ROTH. Exactly.

Mr. MILLER. You see that easily in a publication called Blue Chip Economic Indicators. You have all of these various forecasting groups indicating what their estimates are, and they tend to differ.

Let me say with respect to the several things: First, we believe, and our Justice Department, White House lawyers, OMB lawyers, believe that whoever has that role to play, whether it is the Director of OMB or some other person, must be serving at the pleasure of the President, and second, must have discretion to choose those numbers. That is, they would not be completely bound by the GAO report.

Let me say second, as you pointed out, the law requires the Director of OMB to give due regard to the GAO report and also to justify, to explain any differences that the OMB would conclude or would have with the General Accounting Office.

Third, it is going to be, assuming this legislation is approved, it will be a very public, if a sequester were required—and as we agree, I think, we want to avoid a sequester—but it would be a very public process. That is, OMB and CBO would make their recommendations to GAO, and by the time it got down to the OMB to make its final decision, these issues would be aired very openly.

Let me say that although the timeframe is fairly short, it may well be that I or any other OMB Director would be persuaded on the basis of discussions with CBO and the discussions with GAO that the original assumptions and the original figures were incorrect. And I would be very open to reviewing those, and I would anticipate having good reason to justify any differences between my final report and that of GAO. But I think it is clear that to be constitutional, the person, namely, the Director of OMB, would have to have some latitude to make those final choices, or else one simply would be back in the woods.

Chairman ROTH. I understand you, and I agree with much of what you are saying, but at the first level, let's assume you are more optimistic, for a good reason. There are broad differences by economists, and it has been known in the past for there to be great differences in projections between the Congress and administrations, whether Democrat or Republican.

So let's assume that the administration is more bullish than the Congress and it comes up to you, and you still feel your original projections are correct. Would you feel compelled to adhere to the GAO advisory committee or——

Mr. MILLER. No, no, I would not, and if I would say so, I think I would be saying that my reading of the law would be unconstitutional. I would feel, as I think I indicated, compelled to have good reason to deviate from the GAO report, but I feel that I would have the discretion to deviate accordingly.

I think it would be very surprising to me that if, for example, I, we went through this process and there were differences and that I simply said, "I have looked at this other material, and I think that I was right the first time," and just simply adopted that. The process of discussion with colleagues often reveals, suggests differences.

But, I think to be constitutional, I would have to say that I would have to have some discretion in terms of choosing those final numbers. Again, it is a very public process. Some people have suggested, you know, it would be open for abuse. I just think, as I was quoted accurately in the paper this morning, I think someone would be crazy to try and abuse the system as the provision is here. But you are right, Mr. Chairman. Experts do differ.

One other thing, let me emphasize, going back to what I said earlier. Projections made are fairly well circumscribed in that I would anticipate, frankly, that we will not have appropriations in all areas, so we will have it folded into the continuing resolution and we will be looking at 1986 levels of spending for most things, extrapolating on the entitlement programs.

As you may recall, in January 1986, OMB and CBO estimated the deficit for fiscal 1986, and it was more coincidence than anything else, but we came inwithin $1 billion of each other. I am not suggesting that we would be that close when we make our report on October 5, whether we make it to GAO or directly to the Congress, but I wouldn't be surprised if it was reasonably close.

Chairman ROTH. The administration, in its brief before the Supreme Court argued that it is not unconstitutional for a subordinate officer to issue a command to the President. I think two of our constitutional scholars will testify on this matter later.

While it may not be a major constitutional issue, might it not be preferable to impose a duty making the final excess deficit estimates on the President rather than OMB?

Mr. MILLER. I would have no objection to having the President make those final determinations, rather than the OMB Director, then reporting it and then transmitting those to the President.

I think the Solicitor's argument before the Supreme Court went to the question posed by Mr. Cutler—the remedy proposed by him that would make the Comptroller General no longer removable by the Congress for cause. That would leave, frankly, the Comptroller General in a limbo situation, very much like a judicial officer or, with respect to reporting and accountability, just as a judge, removable essentially only by impeachment, and we do not believe that would be appropriate.

Our reading is that if a subordinate serves at the pleasure of the President, then this language is constitutional; it is acceptable.

Chairman ROTH. Senator Eagleton requested that I ask a question on his behalf. It is sort of a modified version of the fallback provision, what he called "semiautomatic cuts," which would work as follows.

The Comptroller General would draft a sequestration order in exactly the manner now provided for under Gramm-Rudman-Hollings. But, rather than presenting the order directly to the President, as the act prescribes, the amendment would require, instead that it be submitted simultaneously to both Houses for ratification and presented to the President for signature or veto.

The process would take place no later than 3 legislative days after the draft order is received; there would be no amendments. It would be a privileged matter; 1 hour of debate. If the President should veto, a similar expedited schedule would apply to the veto override vote.

He would like to hear your comments on that.

Mr. MILLER. My response to that, based on what you have said, if I understand you correctly, is that that would be constitutional. That is really not very much different from the fallback position we have now, whereby CBO and OMB would report to the Congress. This would have, I guess, the additional step of CBO and OMB reporting to the Comptroller General and the Comptroller General would report to the President and to the Congress, and then you have an expedited procedure for the presentation of the joint resolution to the President.

That seems to me constitutional, but just a variant on the present fallback position.

Chairman ROTH. I think it is his feeling that in a way, this is a political matter, and that by using this procedure of getting the GAO's recommendations provides a certain amount of shield or protection to Congress, and for that reason, might be more acceptable and more realistic than the current backup.

Jim, you said that the "impeachment only" proposal would not be appropriate. Does the administration believe it to be unconstitutional, and if so, why?

Mr. MILLER. Well, it believes it to be unconstitutional. The nearest analogy I can think of is if someone is removed—the only people that are removed only by impeachment are Federal judges, and in a sense, this would make the person analagous to being a member of the Judiciary. That separation of powers—it's the same argument as before, except the person——

Chairman ROTH. We have the President, of course, and Vice President.

Mr. MILLER. Surely, but they are elected officials, and they are listed in the Constitution of the United States, and they are the executive branch of Government. They are the leaders of the executive branch of Government. But if the person is not accountable to the President, directly accountable to the President of the United States, I don't see how they could be part of the executive branch of Government, and in *Synar,* the determination in *Synar,* I believe, clearly indicated that the person who made these kinds of decisions, we believe, would be serving at the pleasure and certainly would be a part of the executive branch of Government.

Chairman ROTH. Senator Levin?

Senator LEVIN. Thank you, Mr. Chairman. Mr. Miller, relative to the economic assumptions that you make and the CBO makes, do you use the same guidelines and criteria in arriving at those assumptions or making those assumptions as the CBO does?

Mr. MILLER. I don't think—it probably would not be correct to say they are guidelines. Basically, they are economic data out there. We all read the same kind of data. We receive Commerce Department reports and other official statistics, and we plot our regressions. But then essentially, it all goes into a black box, where we discuss it and come up with some answers. Rudy's technique is not dissimilar to ours. We simply look at all the data, what the pundits were saying, the Blue Chip was saying, and we run our models, and we forecast the different component determinants of revenues and of expenses and then draw our conclusions.

Senator LEVIN. You say that his criteria and methodologies are not dissimilar from yours.

Mr. MILLER. Right.

Senator LEVIN. Would you be able to identify for this committee, working with the CBO, what criteria, what methodologies are used in making these assumptions and where you and the CBO differ in those criteria and methodologies?

Mr. MILLER. Yes. One place that we do differ is that we have what is called the T-1 process. It is named after the Secretary of the Treasury, but basically, the Secretary of the Treasury, the Director of the OMB and the Chairman of the Council of Economic Advisers meet together and make the determination about the assumptions, for example, that go into the President's budget: Growth assumptions, inflation assumptions, unemployment assumptions, interest rate assumptions, and whenever there is an update, we meet to make any modifications. We met yesterday afternoon in the wake of the figures that we received in order to settle on assumptions for the Mid-Session Review, and I understand Rudy does not have that kind of process.

Senator LEVIN. You don't pull these assumptions out of your gut?

Mr. MILLER. No, we do not.

Senator LEVIN. So that you can identify the criteria and the methodology which you use?

Mr. MILLER. I could give you them.

Senator LEVIN. In making the assumptions relative to outlays, loan levels, unemployment figures, real GNP, inflation, T-bill rates, and so forth?

Mr. MILLER. Sure.

Senator LEVIN. And you believe that CBO can also identify——

Mr. MILLER. Yes.

Senator LEVIN [continuing]. The methodologies and the criteria?

Mr. MILLER. I remember hearing Rudy give a speech on how they went about compiling their figures.

Senator LEVIN. Mr. Chairman, I would like the committee to request Mr. Miller and the CBO to provide us, for the record, those methodologies and criteria which each of them uses in making the critical assumptions that we are talking about, with the possibility that we actually put into legislative form the criteria and the methodologies that we prefer, where there is a difference, so that we can have some guidelines for the exercise of whatever discretion Mr. Miller has to have in order to make sure that this is constitutional.[4] At least that is a possibility.

I don't know that we want to follow that course, but it is a critical decision for us to make as to whether to legislate in that area or not, and it would be very helpful if the committee could request Mr. Miller and the CBO to provide us that information.

Chairman ROTH. I would be happy to make that request of Jim Miller now, and the same of the CBO, the same one. I would say this: That time is of the essence, and that it would be important that we receive these.

---

[4] See p. 68.

Mr. **Miller**. Fine, we will do the best we can in the short amount of time.

[The material referred to follows:]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

AUG 11 1986

Honorable Carl Levin
United States Senate
Washington, DC 20510

Dear Carl:

In answer to your question, the Administration's economic assumptions represent a consensus of the three senior economic policy officials in the executive branch. Behind the forecast is the analysis of an interagency group known as the "troika."

The "troika" structure consists of three levels. At the top level, T-1, are the Director of OMB, the Secretary of the Treasury, and the Chairman of the Council of Economic Advisers; they ultimately decide on the broad economic assumptions. The second level, T-2, consists of the Associate Director for Economic Policy at OMB, Treasury's Assistant Secretary for Economic Policy, the member of the CEA who specializes in macroeconomics, and Commerce's Under Secretary for Economic Affairs. The third level, T-3, is composed of members of the career staffs of the several agencies. The forecast is reviewed and updated in late fall for the January budget and in early summer for the Mid-Session Review of the Budget.

The following steps are taken in preparing the economic assumptions. After discussions with the T-3 staff, T-2 meets and agrees upon a path for the major macroeconomic variables -- real economic growth, inflation, unemployment and interest rates -- which reflects their view of where the economy is headed at that point in time. The recommended path is based on an in-depth look at the domestic and world economies with an eye toward updating and extending the Administration's forecast. The recent performance of the economy is assessed in relation to what was assumed in the previous forecast, taking into account monetary policy and pending legislation which would affect budget receipts and outlays. This recommended path is forwarded from T-2 to T-1, the ultimate decision-makers.

Over the first 12 to 18 months of the forecast, the aim is to come up with a forecast that will mirror as closely as possible the actual path of the economy. The projections for the outyears are based on the economy's underlying trends in the context of the President's overall policies. For example, it is the President's policy to take various measures in regard to taxes, regulations, and other matters aimed at making the economy perform more efficiently. To the extent that these steps are successful, then the rate of growth in real GNP in the future will be higher than that which historically has occurred. Hence, the Administration's forecasts in the outyears represent both an economic projection and a policy goal. They assume that the budget's recommendations for fiscal policy will be followed -- in our case to achieve the highest sustainable rate of noninflationary economic growth.

After T-1 has agreed on the key economic assumptions, the T-3 staff prepares a more detailed breakdown of the components of GNP and the shares of national income. This detail is needed in order to estimate budget outlays for specific programs and to calculate budget receipts. The forecast detail also provides a useful check on the consistency of T-1's broader economic assumptions.

By custom, in order to focus attention on policy changes, the forecast done in the context of Presidential policy is also used for current services and now for the Gradison baseline.

Please let me know if I can be of further assistance.

Sincerely yours,

Jim

James C. Miller III
Director

CONGRESSIONAL BUDGET OFFICE
U.S. CONGRESS
WASHINGTON, D.C. 20515

Rudolph G. Penner
Director

August 21, 1986

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your letter of July 28th requesting information on how CBO forecasts the budget deficit under provisions of the Gramm-Rudman-Hollings law. Developing budget projections is a lengthy and complicated process absorbing a very large portion of CBO's resources. The work proceeds in two phases: (1) the development of economic assumptions, and (2) the preparation of detailed projections of revenues and outlays consistent with the economic assumptions and with specified budget policies. Given the complexity of the projection process, the following description is only the briefest outline of the activity required to make budget estimates.

The preparation of economic forecasts is an ongoing process: the economy is being monitored constantly, errors in the previous forecasts are continually analyzed, and economic relationships are reestimated frequently as the economy's structure changes. A wide variety of advanced indicators of future economic activity are examined: broad indicators such as credit conditions, unemployment rates and the growth of personal and business incomes provide insights into the general economic environment; specialized indicators, such as the Commerce survey of business plans for capital spending and housing starts provide information about future levels of economic activity in specific sectors of the economy. Insights are also derived from the forecasts of respected private forecasters as well as forecasts generated by econometric models representing alternative economic theories. The examination of other forecasts also provides an indication of the range of likely outcomes--a crude measure of uncertainty. 1/

---

1. This description of the preparation of economic assumptions applies primarily to the short-run forecast reported in the Sequestration Report. CBO's longer run economic projections are generally based on historical trends. See, for example, CBO, The Economic and Budget Outlook: An Update (August 1986), pp. 5-8.

There is an important difference between CBOs economic projections and those of private forecasters. Unlike private forecasters, CBO does not project possible changes in federal budget policy. Instead, CBO is required to adopt specific assumptions about budget policy—in the present case the deficit targets specified in the Balanced Budget Act. The difference between CBOs "conditional" forecast and other forecasts can sometimes be traced to these policy assumptions.

Using all of the above information, including the budget policy assumptions, CBO generates an economic projection based on judgment rather than a specific macroeconometric model. However, econometric techniques are used to develop projections of various sectors of the economy, and because a large number of economic variables are needed to make budget estimates, CBO has developed a computer program to help ensure internal consistency of components of the projection.

In preparing the economic projection CBO also calls upon the advice of recognized experts from outside CBO. Well before the projection is final, the economic outlook is reviewed at a meeting of the CBO Panel of Economic Advisers. 2/ Generally special guests, who have expertise on particular current issues, are also invited to present their views. These deliberations often have a significant impact on CBO's final economic projection.

The projection of budget estimates requires even more staff hours than the preparation of economic assumptions. The CBO projections of the level of economic activity, of personal and corporate income, prices, and investment are used by the CBO staff to generate detailed revenue projections, measured on both Unified Budget and National Income and Product Account bases. The revenue projections are generated using highly detailed historical tax data, recent U.S. Treasury Department financial statement data, and econometric models. The revenue projections, along with the CBO outlay projections, are then fed back into the CBO economic data forecasting process in an attempt to ensure consistency of economic and budget projections.

In addition to the input from the economic projection—including detail on interest rates, prices, wages, unemployment and economic growth—the outlay projections involve an in-depth examination of the behavior of all major spending programs. CBO has developed a number of independent models for estimating outlays for programs that are sensitive to assumptions about the economy, demographic factors, and program utilization rates.

---

2. A membership list is enclosed.

This includes most of the income assistance programs such as Social Security, unemployment compensation, federal employee retirement, and veterans compensation and benefits. CBO also has its own estimating models for Medicare, Medicaid, and other programs providing services and benefits to individuals. For these programs, CBO's outlay projections assume that existing laws will continue unchanged, and that future spending will respond to assumed economic and population changes in the same way that it has responded to such changes in the past.

For spending programs that are dependent upon the levels of new budget authority that are appropriated each year, CBO estimates annual outlays by using historical patterns of how budget authority spends out over time. The use of spendout rates is particularly important for defense programs and for most nondefense discretionary programs.

Federal spending for net interest is projected consistently with the projections of revenues and other outlays and with CBO's assumed interest rates. In estimating interest on the public debt, each type of marketable and nonmarketable debt security is projected separately. Existing debt is assumed to be refinanced at the applicable market rate at its time of maturity. The debt is increased by the amount of new borrowing, which is distributed among the months of the year and among different types of securities based on CBO's assumptions about seasonal borrowing needs. (Further details on CBO's revenue and spending projections are contained in Appendix A of our annual report to the Budget Committees, The Economic and Budget Outlook: Fiscal Years 1987-1991 (February 1986).)

The Balanced Budget Act requires spending estimates to be done at the individual budget account level. It also requires a distinction to be made between outlays from new budgetary authority that are sequestrable and outlays from obligated balances that are not. A number of other calculations also must be made for administrative expenses, cost-of-living adjustments, and various special rules that apply to certain programs. In effect, the Balanced Budget Act stipulates a complicated set of formulas that must be applied to over one thousand budget accounts.

I hope that this information is useful to the Committee. We would be happy to provide more information on our economic and budget projection methodologies should you so desire.

With best wishes,

Sincerely,

Edward Gramlich
for
Rudolph G. Penner
Director

Enclosure

CBO PANEL OF ECONOMIC ADVISERS
June 1986

Barbara Bergmann
Professor of Economics
Department of Economics
University of Maryland
College Park, Maryland 20740

Barry P. Bosworth
Senior Fellow
The Brookings Institution
1775 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Dewey J. Daane
Frank K. Houston Professor of Banking
Graduate School of Management
Vanderbilt University
401 21st Street South
Nashville, Tennessee 37203

Martin Feldstein
President
National Bureau of Economic Research
1050 Massachusetts Avenue
Cambridge, Massachusetts 02138

Alan Greenspan
President
Townsend-Greenspan & Company, Inc.
120 Wall Street
New York, New York 10005

Eric A. Hanushek
Chairman
Department of Economics
University of Rochester
Rochester, New York 14627

Walter W. Heller
Regents' Professor of Economics
Department of Economics
University of Minnesota
Minneapolis, Minnesota 55455

Walter E. Hoadley
Executive Vice President, Retired
Bank of America Center
P.O. Box 37000
San Francisco, California 94137

F. Thomas Juster
Director, Institute for Social Research
University of Michigan
Ann Arbor, Michigan 48106

Lawrence R. Klein
Benjamin Franklin Professor of Economics
University of Pennsylvania
Department of Economics
3718 Locust Walk CR
Philadelphia, Pennsylvania 19104

John Makin
Director, Fiscal Policy Studies
American Enterprise Institute for Public
Policy Research
1150 Seventeenth Street, N.W.
Washington, D.C. 20036

Paul W. McCracken
Edmund Ezra Day Distinguished
Professor of Business Administration
Graduate School of Business Administration
University of Michigan
Ann Arbor, Michigan 48109

Leif H. Olsen
President, Leif H. Olsen & Associates
400 Park Avenue
14th Floor
New York, New York 10022

Rudolph Oswald
Director, Research Department
AFL-CIO (Room 504)
815 16th Street, N.W.
Washington, D.C. 20006

Joseph A. Pechman
Senior Fellow
The Brookings Institution
1775 Massachusetts Avenue, N.W.
Washington, D.C. 20036

George Perry
Senior Fellow
The Brookings Institution
1775 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Alice M. Rivlin
Director, Economic Studies
The Brookings Institution
1775 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Paul Samuelson
Institute Professor
Department of Economics
Massachusetts Institute of Technology
Cambridge, Massachusetts 02139

Charles Schultze
Senior Fellow
The Brookings Institution
1775 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Herbert Stein
2500 Virginia Avenue, N.W.
Apartment 603-S
Washington, D.C. 20037

James Tobin
Sterling Professor of Economics
Department of Economics
Yale University
Box 2125 Yale Station
New Haven, Connecticut 06520

Murray Weidenbaum
Director, Center for the Study
of American Business
Washington University
Campus Box 1208
St. Louis, Missouri 63130

Senator LEVIN. Thank you. Mr. Miller, right now, the OMB and the CBO get together to help formulate the sequester order. There is a meeting in an attempt to formulate a common position on this. Would we have your assurance, assuming we adopted this new approach, where you have a final look-see at it, would we have your assurance that the OMB would not change assumptions and criteria from your initial discussions with the CBO if, in fact, under Gramm-Rudman II we give the OMB a second solo role in the formulation of the sequester order?

Mr. MILLER. Let me answer, because it is more complicated or it is somewhat complicated. One, there are areas where CBO and OMB do agree, end up agreeing. There are a lot of very specific interpretations of the Gramm-Rudman-Hollings law and how they apply to functional accounts. I remember seeing that there was a sheet of about 60 issues last December and January that were going around that we had to resolve. These involved very minor, very esoteric things, but decisions had to be made in order to decide how to deal with an issue.

There was only one left unresolved, and it had to do with the Washington Metropolitan Area Transit Authority. GAO came down on the side of CBO for fiscal 1986, but the reasoning would suggest, and from preliminary discussions with them, they would come down on the OMB version for 1987 and beyond. I would just say that in terms of agreeing on those technical questions, I would have to anticipate no change in the final solo role.

I would not make any changes in those assumptions, those determinations. But on the question of the assumptions of growth and employment and inflation, interest rates, and so forth, as you know, CBO makes a forecast of the deficit, but also to derive the deficit, they have to have growth, inflation and so on, and they make assumptions about the economic growth of the economy, and they give their estimate of what this would be.

Likewise, OMB makes the same kind of calculation separately. Our rates, our assumptions for growth rates and inflation and unemployment and interest rates may not be the same. Then we have these two separate sets of figures, and under Gramm-Rudman-Hollings, those figures are averaged. If OMB projects that gross national product will be $4.2 trillion and CBO projects it will be $4.3 trillion, then the average is $4.25 trillion, and so the report that goes to the General Accounting Office reflects those averages. Also, the OMB-CBO report on the account-by-account sequestration is based on those average numbers.

Now, on the other hand, I cannot assure you, Senator, that in the final solo role of OMB, that OMB would adopt a set of assumptions that would give you projections of exactly the average numbers. In fact——

Senator LEVIN. That wasn't my question.

Mr. MILLER. In fact, if I could point out, it may be that it would be an inconsistent set of assumptions that would give you those average numbers as a technical matter. I am sorry I misunderstood you.

Senator LEVIN. The question is whether or not, when you take a second look, you are going to stick with the same numbers that you used in your joint meeting with the CBO in your first look, the same assumptions, same criteria?

Mr. MILLER. No.

Senator LEVIN. Same estimate?

Mr. MILLER. As I indicated to Chairman Roth, I think first, to be constitutional, I would have to have, it would have to be clearly understood that anybody, whether it is directly for OMB or anybody else, that this kind of mechanism would have to lease some kind of discretion to make the final choice.

Second, as I indicated, I might change some of those from the original input that we had because I was persuaded by CBO or by GAO that their view was superior. So I simply, I cannot promise you that I would make, that I would have the same assumptions in the final solo version that I had earlier or that I would adopt CBO's assumptions, or, implicitly, GAO's assumptions.

Senator LEVIN. Now looking at the GAO recommendation to you for that solo look, assuming that is placed in the law, do you believe that GAO advice or recommendations should carry some presumptive weight, some validity?

Mr. MILLER. Yes, I think it is appropriate to say that, inasmuch as the law requires that I give due regard to that, and that obviously establishes that report as something that is almost a prima facie case.

And second, the language that I have read would require me to justify, to explain any differences in my outcome from that recommended by the Comptroller General. But again, it would be constitutional; I would have to have that freedom to make that.

Senator LEVIN. When you look at that word "explain," and that is exactly what I wanted to get to, you think because of the prima facie validity of the GAO recommendation that there would be some requirement or a requirement upon you to do more than explain, but there would be a requirement to justify?

Mr. MILLER. Yes. Yes, sir. I have used the term justify, and I would look at it that way.

Senator LEVIN. Thank you, Mr. Chairman.

Chairman ROTH. Just a couple more questions. Insofar as the Comptroller performs the executive functions, does the President have the constitutional power to remove him, either for cause?

Mr. MILLER. Oh, that is a very interesting question. No, my reading is, (A), the President does not have the authority to remove the Comptroller General at will; but second——

Chairman ROTH. For cause?

Mr. MILLER. I am not sure that it would be correct to characterize the Comptroller General's activities at the present moment as being executive in nature, although that surely would be an issue, I think, inescapably, before the courts; that some of the activities engaged in by the Comptroller General will be found to be executive branch functions and therefore, unconstitutional with the law presently as written.

Chairman ROTH. To what extent will the deficit exceed the target for 1987 when you take your snapshot?

Mr. MILLER. Mr. Chairman, I don't know for sure. Again, the deficit is the difference between two very, very large numbers, and then the question of how far it exceeds $144 is even a smaller number and is subject to a good deal of error of estimate, and it depends very much on assumptions. It depends very much, from our standpoint, on what we get back from the Treasury Department as a final cut on revenue estimates for fiscal 1987.

We, from our preliminary look, we are looking at something in excess of that, not only the $144, but $154, probably $10 billion in excess of that, of the $154 billion, and if, in the event Congress does not do anything, and that, again, is assuming the Gradison baseline, and very little in the way of appropriations being signed into law by the beginning, by the date of August 20.

But of course, you know there is the August 20 report and then there is the October 5 report, and of course, since October 5 falls on a Sunday, it would be October 6. We would have every hope and intention of working with the Congress to get that number down so that the October 6 report would show a lower number.

Chairman ROTH. Thank you for being here today.

Senator LEVIN. Mr. Chairman, just a few more questions of Mr. Miller. One has to do with the executive functions being exercised, the so-called executive functions being exercised by the GAO now. We have their long list that has been given to us. Are you going to challenge the exercise of all of those functions the way you challenged the GAO in the Gramm-Rudman-Hollings situation?

Mr. MILLER. I do not anticipate our doing that in the near future.

Senator LEVIN. Why is that?

Mr. MILLER. Well, let me say, in the Gramm-Rudman issue, the case was not brought by the Attorney General. The Attorney General joined in an amicus brief before the Supreme Court, before the special three-judge panel as well as before the Supreme Court.

Senator LEVIN. But as a matter of principle, the President opposed in the Supreme Court the exercise of executive functions by the GAO.

Mr. MILLER. Yes.

Senator LEVIN. He is not going to do it in all of these other areas?

Mr. MILLER. Not only that, but the President demurred when he signed Gramm-Rudman-Hollings, and indicated in the signing statement that he questioned the constitutionality of that provision.

Senator LEVIN. I don't understand the inconsistency.

Mr. MILLER. Then you are looking at additional executive branch functions, so-called executive branch functions. Recall now that the view of the Justice Department about the role of the GAO, the Comptroller General, I think a view that has been shared by the Justice Department hierarchy going back many, many years for different administrations, is that some of these activities are not constitutional, are executive branch functions. In fact, as you know, there is a case involving the Competition in Contracting Act. To my knowledge, that is the only specific challenge the administration has made to that.

However, with the Supreme Court's decision in *Synar,* it seems rather apparent that other provisions, if challenged, would fall. No decision, to my knowledge, has been made by the Attorney General or by the administration generally at this point to challenge those.

Obviously, the question of the Comptroller is one very much on our minds, and as I have indicated before, I look forward to sitting down with Members of Congress and discussing, in the light of *Chadha* and its prodigy, including *Synar*, how best to reform that act with respect to deferrals and rescissions.

Senator LEVIN. Another question has to do with the removal for cause. You have indicated that you believe that impeachment alone of the Comptroller General would not satisfy *Synar*. Would a provision which provides for removal for cause by the President, for cause as being specified, meet the constitutional standard, in your view?

Mr. MILLER. The answer, simply, Senator, is no. I used to be in such a protected position at the Federal Trade Commission. Having concluded that it would not be constitutional, it at best would put it right back in court.

Could I mention one other thing, Mr. Chairman?

Chairman ROTH. Surely.

Mr. MILLER. We would welcome not only some fix to Gramm-Rudman-Hollings, some fix to the automatic sequester mechanism, but we would welcome consideration of line-item veto, consideration of the rescission authority and, in addition, moving forward on the President's proposal for a constitutional amendment for a balanced budget.

Chairman ROTH. Do you think you were in a constitutional office when you were at the FTC?

Mr. MILLER. I have my doubts. "Humphrey's Executor" is the law of the land, and we abide by that, but as you know, the issue was raised in the *Synar* opinion by Judge Scalia. There was some discussion of it, I believe, by members of the Supreme Court indicating that they would imply, or a reading of their decisions would imply that they would uphold "Humphrey's Executor." The others did not speak to that position, saying it was not presented to them. I think there is a question.

Chairman ROTH. As you recall, under the Budget Act of 1974, it dealt with the question of impoundment. Of course, in part, that process has been litigated. Do you think the 1974 law with respect to rescissions and deferrals is constitutional?

Mr. MILLER. I think there is some question. I do not anticipate challenging that provision in any way. I look forward to discussing that with Members of Congress. As you know, post-*Chadha*, the one-House veto is no longer there. We have got, I think the administration and Congress have to revisit that issue at some time.

Chairman ROTH. Yes, I would agree with that. I would like to explore that further. Thank you very much, Jim, for being here today. I apologize for interrupting your schedule.

Mr. MILLER. Thank you, sir.

Chairman ROTH. Next we have a panel. We are very pleased to have with us two distinguished experts in the field of constitutional law. Ernest Gellhorn is managing partner in the law firm of Jones, Day, Reavis & Pogue in Washington, DC, and is a former dean of Case Western Reserve Law School in Cleveland, OH.

We are also pleased to have here Professor Sunstein, who is professor of law at the University of Chicago. In addition to many articles dealing with separation of power problems, Professor Sunstein is coauthor of a major treatise on constitutional law.

Gentlemen, I am very pleased to have you both here. We will include your full statements as if read. I would appreciate it if you would summarize. Who wants to proceed? Mr. Gellhorn?

TESTIMONY OF ERNEST GELLHORN,[5] MANAGING PARTNER, JONES, DAY, REAVIS & POGUE, WASHINGTON, DC, AND FORMER DEAN, CASE WESTERN RESERVE LAW SCHOOL, CLEVELAND, OH; AND PROF. CASS R. SUNSTEIN,[6] UNIVERSITY OF CHICAGO LAW SCHOOL, CHICAGO, IL

Mr. GELLHORN. Thank you very much, Mr. Chairman. I appreciate the opportunity of appearing today and submitting my statement for the record. In light of the lateness of the hour and the length of your deliberations, I will focus on two or three major points.

The first point I wish to make is that in light of the series of decisions by the Supreme Court, beginning with *Buckley* v. *Valeo*, going through *Chadha* and the *Synar* decision of just a few weeks ago, it is clear that the Court has taken consistent action to preserve and protect the Presidential authority against innovative efforts to invade it. Each time Congress has sought to be innovative in this area and move outside of the realm of the tripartite division of powers, the Court has acted with a surprising degree of unanimity to strike down those efforts. The Court has protected the President against invasions of his appointments power in *Buckley* v. *Valeo;* the legislative veto in the *Chadha;* and most recently, in the attempt to give the Comptroller General executive authority in the budget process.

None of these cases, however, goes so far as to challenge the existence of the independent agency in the effort to utilize additional mechanisms to accomplish a serious legislative design. There are, of course, lurking questions. One is whether the independent agency is, itself, constitutional. As I read the Court's deliberate effort not to address that question in *Synar,* there is at this point no clear majority to overturn that approach.

But, more importantly, I would urge that the Congress not utilize independent agency approach by establishing an additional administrative body to accomplish its ends here.

I would also suggest that there was a lurking issue before the Court which it did not address but which obviously bothered justices. It involved the authority given the Comptroller General to, in essence, make a final decision which the President had to follow. That is if the Comptroller General is exercising executive functions, as the court decided under the current law, would it be appropriate for a subordinate official in a position to tell the President what to do? I believe the answer must be in the negative, but the Supreme Court did not specifically say that.

I mention these points because I think they provide direction for where the Congress might wish to go in correcting the constitutional infirmity of the Gramm-Rudman law. It seems to me there are several options available. One is simply to eliminate the congressional removal authority, raising, however, the question as to whether or not relying solely on impeachment is constitutional or desirable.

---

[5] See p. 107 for Mr. Gellhorn's prepared statement.

[6] See p. 132 for Mr. Sunstein's prepared statement.

I would ultimately come to the conclusion that an executive official removable only by the impeachment provision would be constitutional, but I admit it is a close question, and I can see several arguments made in opposition. It likewise seems to me clear that there would be two appropriate ways to solve the current dilemma. Congress could rely either on the fall-back position in the statute—of a joint resolution approved by the President—or the truncated version that Senator Eagleton has proposed before the committee today.

The question here, I would suggest, is something different. It is whether either of these resolutions would accomplish the legislative design that is the underpinning of the Gramm-Rudman-Hollings law. The law was designed to modify the legislative process in a way that pressure would be brought on both Congress and the President to address the recurring issue of continuing deficits. Congress had concluded in our modern day, modified political structure relying heavily on television and special interest groups, that there is inordinate pressure on it and the President to opt for programs and not to face responsibly the deficit issue.

That brings me to the final alternative that I discuss in my statement. It is to leave the current statute alone and make one addition; namely, to make the President responsible for the decision of whether or not to accept the recommendations of the Comptroller General, and to make the determination of whether or not they are consistent with the recommendations also made by the Director of the Office of Management and Budget and the Congressional Budget Office. In addition, if Congress wishes to confine the President in his decision, it would be appropriate to ask or to direct that the President's decision shall be supported by findings that explain and justify any deviation from the recommendations of the Comptroller General.

This approach, I suggest, has many advantages. It makes no changes to the basic statute. It confirms the political agreement already reached. It adds additional weight to the pressure to reduce deficits. It raises the political visibility and, therefore, the accountability of the various political actors in seeking to control our deficits.

And it would add the legislative control of asking and directing that the President make findings to justify any deviation from the Comptroller General's recommendations. I would question the alternative, albeit a close one, of having the Office of Management and Budget be the final determinant. It is a bit, it seems to me, like having the batter determine whether or not the pitch is a ball or a strike, because OMB has already participated in the decisional process earlier along the way.

Finally, I would urge that Congress not address and seek to resolve the independent agency issue. That is an issue for another day and another time. It ought not to be confused with the effort to reduce the deficit. Thank you.

Chairman Roth. Mr. Sunstein?

Mr. SUNSTEIN. Mr. Chairman, I have a few brief remarks on the two questions before you, first, the question of how to fix the statute and second, the question about the status of the Comptroller General.

On fixing the statute, I think the recommendations of Senators Gramm and Hollings are the best way to go. First, that would, in my view, solve the constitutional question. If authority is conferred on OMB subject to Presidential supervision, the objection of the Supreme Court's *Bowsher* opinion has been met.

The only objection that remains is, as has been discussed earlier, the nondelegation objection, but that one, I think, was adequately answered in the opinion of the district court, participated in by Judge Scalia. Indeed, it answered in part by the characterization—by a majority of the Justices in the *Bowsher* case—of the functions under the act as executive in character. If the functions can be characterized as executive, they are not legislative, and the delegation is constitutionally permissible.

Thus, first and most important, this fix would, in my view, resolve the constitutional question. It would, at the same time, confer on politically accountable actors the authority to make the decision, and while there are costs in doing that—of partisan politics affecting the process—there are advantages, as well. If OMB, subject to Presidential review, is making the decisions, those decisions will be politically highly visible, and there will be opportunities for congressional oversight.

Third, and most important, there are, in my view, sufficient safeguards built into the act as it stands so that OMB would not have broad discretionary authority. The statute as it stands does not confer on the Comptroller General broad discretion. If those authorities were transferred to OMB, there would not be broad discretion in OMB.

Having said that, let me suggest a few points for limiting the possible risks and dangers associated with the granting of authority to OMB. First, the Congressional Budget Office and the Comptroller General should have a role in the decisionmaking process. That is suggested by Senators Gramm and Hollings, and it is absolutely correct.

Indeed, it seems to me appropriate not only to require the head of OMB to give due regard to the Comptroller's determinations, but also to make him come up with findings to explain any deviation from the conclusions by the Comptroller.

Those findings should, in my view, be subject to judicial review. The current provision in the statute eliminating judicial review should be deleted.

Finally, there should be a continuing congressional role in the form of an opportunity for congressional override of OMB determinations with respect to the aggregate level of the cuts, as well as OMB determinations with respect to how much each particular program should be cut.

I think, then, that the best remedy for the constitutional defect is to have OMB making the determination subject to Presidential supervision. Let me add a few very brief words on the defects in the alternatives. Elimination of congressional removal power might well not solve the constitutional problem. It would, moreover, be a crude approach to the question before you, because it would alter the entire status of the Comptroller General, and as you, Mr. Chairman, and others have suggested, this is not a good occasion for doing that.

Moreover, that proposal is not clearly a good idea. Independence from Congress or the President in these determinations is hardly unambiguously desirable. I agree with Dean Gellhorn; the generation of an entirely new bureaucracy to administer the act wouldn't be a good idea, either. Such a bureaucracy would have all the costs associated with the creation of a new bureaucracy, and in any event, under the *Bowsher* decision, that bureaucracy would have to be accountable to the President or at least could not be accountable to Congress. Under the arrangement that would have to be designed to give constitutional approval, it is not clear that the new office would be any different from OMB.

Having said all this, let me make some very brief and general remarks about the current status of the Comptroller General. This is a very different issue, of course, from the more particular issue of how the statute should be fixed.

There is no reason to believe that independent agencies will be held unconstitutional in the next year or even the next 5 years. But there is some reason to believe that their precise status is in constitutional doubt, and in any event, they are a constitutional oddity. There is no constitutional provision for an independent fourth branch of Government. This is a position set out in the opinion enjoined by Judge Scalia, by the lower court, in the *Synar* case.

One of the problems with independent agencies is that they were born in the period of enthusiasm for neutral expertise as the driving force of regulatory decisions. No one quite believes that any more. There is no such thing as neutral expertise. Another problem is the independent agencies are said to be uniquely accountable to Congress as the executive agencies are not. But there is no reason that should be so. Congress has the ultimate power to control both the executive agencies and the so-called independent agencies through making law. This was a point emphasized by Senator Rudman about an hour ago, and it is absolutely correct.

In my view, the *Synar* case casts great doubt on the current status of the Comptroller General. The reasoning of the third circuit in the recent case involving a contracting statute can no longer be the law after the Supreme Court decision.

This would suggest that one of two things has to be done. First, the removal power has to be changed, perhaps deleted; and second, some of the functions engaged in by the Comptroller General have to be shifted. One or the other of those things has to be done, possibly both.

Now, having said that, let me suggest that in deciding exactly what to do about the Comptroller General, one has to distinguish among his various functions. To the extent that the Comptroller General's functions are what they were originally intended to be, that is, quasi-legislative, investigatory, auditing-type functions, there is no problem with the current arrangement. The current law is perfectly constitutional.

Insofar as his functions are adjudicatory, insofar as he is functioning like a court, the current system may well be constitutional because of the special need recognized by the Supreme Court in several cases to insulate adjudicatory functions from Presidential control. Insofar as his functions are Executive, and my understanding is that there are several of them, those functions are in serious constitutional jeopardy now.

I guess I will conclude with the suggestion that one can retain the Comptroller General in his current form insofar as his functions are genuinely Comptroller functions, and that any effort to amend the current statute would not need to compromise the essential features of the 1921 statute.

Thank you.

Chairman ROTH. I thought, Mr. Gellhorn, you might want to comment on Mr. Sunstein's comments. As I recall, in your opening remarks, you talked about the three branches of the Government. Are we permitted to have a fourth, fifth, sixth?

Mr. GELLHORN. There obviously is no clear answer to that, though I would come to the conclusion that the constitutional position of the independent agencies is perhaps more secure than Professor Sunstein suggests. Going back to the Constitution, one might note, of course, that if the Congress tomorrow wished to eliminate the various departments of the executive branch—State, Treasury, Defense—and reduce the President essentially to a secretary and a fine house, there is no constitutional prohibition. In other words, the various departments of the executive branch are not themselves mentioned in the Constitution.

In addition, the Congress has previously, by statute, identified such agencies as the Environmental Protection Agency as an independent agency, even though it is located in the executive branch.

There are, in other words, really relatively few constitutional guidelines. The critical point, though, I would make is that, and here I would agree with Professor Sunstein, insofar as an officer of the Government performs executive functions, the President must be in a position to exercise some supervision and control.

So when an independent agency official such as a member of the National Labor Relations Board or the Federal Trade Commission were to engage in executive-type functions, it is appropriate for the President to intervene and participate in the rulemaking function and to exercise responsible supervisory authority.

Likewise, it seems to me that when those officials perform adjudicatory functions, the President can be prohibited from those decisions, both by statutes and I would also suggest by constitutional provision of the due process.

The Constitution, in other words, does not prescribe that the agency must either be within the executive branch or prohibit them from being outside of the executive branch. One needs to look to the functions being performed and the controls, if any, being placed over the President in supervising such functions.

Chairman ROTH. Let me go back to an earlier comment of yours. We were proposing not a new, independent agency, but of course, a new executive agency to handle Gramm-Rudman. Will there be anything constitutionally wrong with, say, creating either an office or a commission, and then for the President to designate the Comptroller General as the director of deficit reduction; in other words, wear two hats? Does that create any constitutional problem?

Mr. **Gellhorn**. While I believe the answer is yes, there is, of course, no guidance in terms of prior constitutional decisions. Thus I can conceive of arguments that could be made on either side. What is not answered by your question is whether or not the President could remove the Comptroller General from exercising the leadership of that new independent office.

Chairman **Roth**. The answer is yes.

Mr. **Gellhorn**. If that is true, then it seems to me in light of the *Bowsher* v. *Synar* decision, it would be upheld. I think it has serious practical problems and that we don't really need to create one new bureaucracy to support the Comptroller General in making this decision. Indeed, it is sort of contrary to the theme and thesis of Gramm-Rudman-Hollings.

Chairman **Roth**. That is another matter. Let me ask you this regarding the Comptroller General. In view of the executive functions of the Comptroller General, can the President remove the Comptroller General at will or for cause?

Mr. **Sunstein**. I think the answer is no, because the statute says he can't. The question is, is the statute unconstitutional insofar as it says that he can't? I think the Court couldn't engraft on the statute the power to discharge at will, but it could say that the current functions exercised by the Comptroller General are impermissible insofar as the President can discharge him.

Mr. **Gellhorn**. I agree. The result would be that the Comptroller General could not perform the executive functions as long as the President was so inhibited. There is, of course, a possible argument one can make that just as the courts have implied under the Constitution private rights of action, you might want to take the same kind of analysis here and suggest so confining the President is unconstitutional, and that in order to complete the constitutional design, the President would have the authority to remove the Comptroller General.

I think, however, that the Court generally backs away from that kind of confrontation and instead, leaves it for another day.

Chairman **Roth**. If law enforcement functions are executive in nature, may such functions be exercised by nonexecutive agencies? May the FTC, for example, enforce the antitrust laws?

Mr. **Gellhorn**. The precedent is clear that the answer is yes, and that function is being performed today. I would argue that it is permissible, that the location of the enforcement function outside of the executive branch does not itself make it unconstitutional. The chairman of the Federal Trade Commission and the other commissioners are subject to removal by the President under certain statutory constraints. These are sufficient, it seems to me, as the current constitutional design has been interpreted.

There is, of course, an argument to the contrary that is being made with increasing frequency within the courts and the legislative halls today.

Chairman **Roth**. Mr. Sunstein?

Mr. **Sunstein**. The answer is yes, *Humphrey's Executor* so holds. The theory is that the Federal Trade Commission exercises not only executive functions, but also what the Court calls quasi-legislative and quasi-adjucative functions, and because it does all three, it can be insulated from Presidential supervisory power.

A note on that, though: One of the passages in the *Bowsher* case that may turn out to be important says that the words inefficiency, neglect of duty, those sorts of terms, that condition the Congress' removal power over the Comptroller General are very broad. The Court says that those provisions don't really mean independence. They mean the Congress can remove the Comptroller General if it thinks he is doing a bad job.

Now, that suggests that the President can remove the Federal Trade Commissioners for the same reason, because it is precisely the same language in the FTC Act as is in the current Comptroller General statute. If the Court's interpretation of the Comptroller General language is going to track its interpretation of the FTC language, then it turns out that the independent agencies aren't so independent, even under current law. I am not sure if the Court will say that, but it is a conclusion that is not easily avoided after the Court's interpretation of those in *Bowsher*.

Chairman ROTH. Would you care to comment on that?

Mr. GELLHORN. I would note that *Humphrey's Executor* has an additional limitation, and that is that the focus of the Court at that time was on the quasi-judicial and quasi-legislative functions of the Federal Trade Commission.

The Federal Trade Commission at that point had not exercised rulemaking or quasi-executive functions, and the Court didn't focus on that. That has changed since 1935, and this is a theme which is spelled out very carefully in a lecture by Judge Scalia before the Supreme Court Historical Society in 1985 and published in their 1985 yearbook. There is a remarkable similarity between that lecture and some of the language in the district court's *Synar* decision.

Chairman ROTH. Gentlemen, I appreciate your being here today. I apologize for the lateness of the hour, but we have found your testimony most helpful. Undoubtedly, we will want to call upon you again.

Mr. GELLHORN. Thank you.

Chairman ROTH. Thank you very much.

The committee is in recess.

[Whereupon, at 1:35 p.m., the committee was recessed, subject to the call of the Chair.]

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

FOR RELEASE ON DELIVERY
EXPECTED AT 9:30 A.M.
JULY 23, 1986

TESTIMONY OF

CHARLES A. BOWSHER

COMPTROLLER GENERAL OF THE UNITED STATES

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS

UNITED STATES SENATE

ON

THE SUPREME COURT'S RULING IN BOWSHER V. SYNAR

Mr. Chairman and Members of the Committee:

I am pleased to appear before the Committee to discuss the Supreme Court's recent decision in the case of Bowsher v. Synar. As I shall describe, the immediate consequence of that ruling is clear: because the Comptroller General is removable by joint resolution of the Congress, the General Accounting Office may not carry out the budget reduction responsibilities assigned to it under Gramm-Rudman-Hollings. The longer-term consequences for efforts to reduce the federal deficit and for the General Accounting Office depend to a large degree on how the Congress chooses to respond to the decision.

This Committee is fully aware of the many functions carried out by GAO. Among these are the responsibilities assigned to the agency at its creation. The Budget and Accounting Act of 1921 established GAO, with the Comptroller General as its head, to provide the Congress with an objective assurance that public funds are spent properly. Under the 1921 Act, GAO was given the authority to investigate and report on the use of public funds by the executive departments. In addition, GAO was provided a number of administrative powers previously held by the Comptroller of the Treasury. These include the power to settle all accounts of the government, to supervise the collection of debts owed to the government, and to render binding decisions on questions of payment submitted by disbursing officers and department heads. The 1921 Act also gave the Comptroller General the responsibility of prescribing accounting principles and standards for the federal government.

The drafters of the 1921 Act conferred these powers on GAO because of their desire to ensure that such functions would be carried out by an officer of the government whose impartiality both the Congress and the President could rely upon. For 65 years, GAO has filled that role as the objective overseer of the expenditure of public funds. The success of the original scheme is reflected in the reliance that both the Congress and the agencies place on the thousands of legal decisions, financial audits, and program evaluations conducted by GAO each year. It is also reflected in the expansion of GAO's functions over the years. As Chief Justice Burger noted in the majority opinion in Bowsher v. Synar, the Comptroller General has been assigned a variety of new functions since 1921, including the responsibility of bringing suits to require the release of impounded budget authority, membership on the Chrysler Corporation Loan Guarantee Board and the U.S. Railway Association Board of Directors, and the power to consider bid protests under the Competition in Contracting Act.

The drafters of Gramm-Rudman-Hollings also recognized the value of GAO as an impartial decisionmaker, and chose the Comptroller General to hold the all-important trigger mechanism for automatic budget reductions. Although GAO had not sought this new power, years of experience in audit and evaluation made its staff well-equipped to carry out its responsibilities under the act. On January 21, as required by the statute, GAO reported the reductions necessary to meet the fiscal year 1986 deficit target.

The Supreme Court's opinion addressed two principal questions concerning GAO's role under the statute: first, whether it is permissible under the Constitution for an officer of the United States removable by a joint resolution of the Congress to execute the law; and second, whether the role of the Comptroller General under Gramm-Rudman-Hollings constitutes "execution of the law in constitutional terms." The majority opinion, written by Chief Justice Burger, held that the congressional removal power results in control by the Congress that is incompatible with the "execution of the law." The Court also determined that the powers exercised by the Comptroller General under Gramm-Rudman-Hollings were in fact "executive" in the constitutional sense of that term. The Court therefore struck down the role of the Comptroller General under the statute. Justice Stevens, in a concurring opinion in which Justice Marshall joined, concluded that the Comptroller General acts as an agent of the Congress, and as such could not be delegated the important powers assigned to him under the act. Two Justices, White and Blackmun, issued separate dissenting opinions.

The Supreme Court's decision had the immediate effect of invalidating the fiscal year 1986 budget reductions ordered by the President on the basis of GAO's January 21st report. The Court stayed its judgment for a period not to exceed 60 days, in order to permit the Congress to act under the so-called fallback procedures of the statute. Under those procedures, the Congress approved the fiscal year 1986 reductions on July 17th.

The decision also has the immediate effect of precluding GAO's participation in the fiscal year 1987 Gramm-Rudman-Hollings budget reduction process next month. It has been suggested by some that the Supreme Court's 60-day stay effectively retains all statutory provisions of Gramm-Rudman-Hollings in effect until September 5th, and that the Comptroller General is therefore still required to issue a sequestration report for fiscal year 1987 on August 25th. It is clear to us, however, that the stay was intended to give the Congress a sufficient amount of time to deal with the fiscal year 1986 reductions through the legislative process, and was not otherwise intended to extend a statutory scheme considered to be unconstitutional. Consequently, we have no present plans to issue a report on August 25th.

The longer-term effects of the Supreme Court's ruling depend to a large degree on what action the Congress now takes in response. A number of alternatives have been suggested to replace the automatic sequestration mechanism invalidated by the Supreme Court. Several of these would again assign a role to GAO. We are willing to contribute in any way that the Congress sees fit towards the important goal of deficit reduction, although we would not favor any alternative which would interfere with GAO's ability to advise and assist the Congress.

The first alternative available to the Congress, and the one that we prefer, is to retain the procedures currently in effect under the fallback provision of the statute. The existing procedures ensure that the ultimate authority to determine how budgetary resources are reduced is to be exercised by the Congress itself.

Another alternative would be to create an independent board or commission in the Executive Branch to carry out the functions originally assigned to the Comptroller General under the statute. This alternative would clearly avoid the constitutional problems of the original scheme, and could provide some degree of assurance of impartiality.

Other alternatives have been suggested which would keep the Comptroller General in the automatic sequestration process, but would essentially make his report advisory to an existing officer of the Executive Branch. If the Congress determines it desireable for GAO to be involved in the process, such proposals are acceptable to us. One of these proposals, however, would also include a provision authorizing the Comptroller General to bring suit to ensure that the President's order complies with the law. After the decision in Bowsher v. Synar, the Comptroller General's authority to bring this type of action is open to constitutional question. The provision also appears to be inconsistent with a statutory scheme designed to place final authority for making budget reductions in the Executive Branch. For these reasons, we would oppose such a provision.

Finally, one alternative would reinstate GAO as the central decisionmaker in Gramm-Rudman-Hollings, by amending the removal provision considered by the Supreme Court to bar his participation in the automatic sequestration process. This approach would amend the 1921 Budget and Accounting Act by providing that the Comptroller General may be removed by the President. The holder of the office would thus no longer be answerable only to the Congress. The Comptroller General would hold the same status as the head of every agency of the Executive Branch, each of whom is removable by the President, either at will or for cause.

Making the Comptroller General removable by the President would result in a fundamental change in an arrangement that has existed for some 65 years. As I have already indicated, both the Congress and the various agencies have viewed GAO since its establishment under the 1921 Act as an impartial and valuable source of advice and information. The Congress especially has come to rely on GAO as an indispensable aid to its oversight requirements. The great amount of resources that the agency devotes to audit work on behalf of congressional committees, including this committee, testifies to the importance of GAO to the work of the Congress. We would oppose any proposal that might result in a change in that status.

With respect to any proposal to amend the 1921 Act, we are concerned that the Congress, in the rush to find a quick "fix" for Gramm-Rudman-Hollings, may choose an alternative that achieves the unintended result of diminishing GAO's effectiveness. We recognize that the Supreme Court's decision in Bowsher v. Synar may also affect some of the other functions carried out by GAO. In our view, however, legislation addressing the broader implications of the decision for GAO should be considered only after careful study of the Court's opinion. Such legislation should not be included in current efforts to cure the constitutional problems of Gramm-Rudman-Hollings, or be appended to emergency legislation such as that currently required to increase the limit on the public debt. In sum, we believe that any change in GAO's relationship to the Congress and to the President should only be undertaken with great caution and full understanding of the consequences, in order to ensure that the result is consistent with the traditional role that the agency has successfully filled since its creation.

That concludes my prepared remarks, Mr. Chairman and Members of the Committee. I would be glad to answer your questions.

STATEMENT BY
ELMER B. STAATS
FORMER COMPTROLLER GENERAL
OF THE UNITED STATES

BEFORE THE
COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

PROPOSALS FOR IMPLEMENTING THE
DEFICIT CONTROL ACT OF 1985

JULY 23, 1986

Thank you for inviting me to present my views with respect to legislative proposals which have been made to implement certain provisions of the Balanced Budget and Emergency Deficit Control Act of 1985 (P.L. 177).

I have been concerned with the Federal Budget for most of my service in the Federal Government. I entered the Bureau of the Budget (now OMB) in June 1939 and served for 11 years as the Deputy Director of the Budget under Presidents Truman, Eisenhower, Kennedy, and Johnson. I was appointed Comptroller General by President Johnson in 1966. In addition to this experience, President Eisenhower appointed me Executive Officer of the Operations Coordinating Board of the National Security Council where I served from 1953 to 1958 before my reappointment as Deputy Budget Director in 1958.

I received your letter only on Saturday, having been out of the city. My statement, therefore, will be quite brief but I shall be happy to respond to questions.

The Supreme Court ruling is now history and whether I agree or not has little relevance at this time. I have a few comments, however, with regard to the statements included in the ruling which I believe may be relevant to this hearing--matters which I felt were not adequately dealt with or emphasized in that ruling.

- The GAO was created in 1921 as an independent agency, not as a part of the legislative branch. It was not until 1945 when Congress was considering authorizing the President to submit reorganization plans to Congress that a provision was included to exempt the legislative branch from any Presidential reorganization plan. Congress defined the GAO at that time as being part of the legislative branch to exclude it from Presidential reorganization authority. The background for this action was a reorganization proposal submitted by President Roosevelt in the late 1930s to strip away many of GAO's responsibilities and transfer them to the Treasury Department. This proposal was rejected by Congress on grounds that it would weaken the independence of the GAO.

- Appropriation requests for the General Accounting Office, until recent years, were included in the Independent Offices Section of the Budget submitted by the President and was reviewed by the Independent Agencies Subcommittee of the Appropriation Committees rather than the Legislative Branch Subcommittee which reviews the GAO's budget today.

- In my view, the Court ruling did not adequately reflect the independent role which the GAO has played over the 65 years since it was created. The legislative history of the 1921 Act is replete with statements supporting this objective and I believe that you will agree that the provisions of the statute which relate to the appointment, tenure, removal, and retirement of the Comptroller General support the concept of independence. The Congress has underscored time and again since 1921 its desire that the GAO be independent of both the executive and legislative branches in much the same way that audits are made of corporations whose stock is held by the public.

- While there are several statutes which call on the GAO for assistance to Congress, the President likewise in the 1921 Statute was given authority to call on the GAO for similar studies. Section 312 (a) of Public Law 13, 67th Congress, provides that

  > "The Comptroller General shall investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds, and shall make to the President when requested by him, and to Congress at the beginning of each regular session, a report in writing of the work of the General Accounting Office, containing recommendations concerning the legislation he may deem necessary to facilitate the prompt and accurate rendition and settlement of accounts and concerning such other matters relating to the

receipt, disbursement and application of public funds as he may think advisable. In such regular report, or in special reports at any time when Congress is in session, he shall make recommendations looking to greater economy or efficiency in public expenditures."

- In my tenure as Comptroller General, we received many suggestions from the executive branch for audits and reviews and we did, in fact, accept many of these suggestions, reserving our independent right to make the judgment as to the need and priority for such reviews. Moreover, the vast majority of recommendations made by GAO that were implemented by the executive branch were made on their merits without regard to any action by the Congress.

- During my term, I reserved the right to independently determine the scope and priority of requests for specific Congressional studies and audits unless mandated in a statute, a practice incidentally which I discouraged. We made it clear in all circumstances that GAO's conclusions and recommendations would be independently arrived at. The Congressional requestor did not always agree with our conclusions and recommendations but GAO's independence was widely respected as essential to its overall integrity and value as a governmental institution.

- Any implication in the Supreme Court ruling that the GAO's statutory responsibilities, as well as the provision for Congressional initiative to remove the Comptroller General, weakens its independence, simply did not accord with the facts as I experienced them during my term of office. I have no reason to believe it played a part before or since. Any perception within government or outside that the ruling lessened the independent role of the Comptroller General would, in my opinion, be both misleading and detrimental to the effectiveness of the GAO as an institution. I have been distressed in media commentary on the ruling that the Court's ruling was based on the Comptroller General as "an appointee of the Congress" or "an employee of the Congress," implying a subservient role to the Congress and thus not be able to exercise an independent judgment.

- There is no doubt that the GAO plays an important role in assisting the Congress in carrying out its oversight responsibilities of the executive which has responsibility for the administration of laws enacted by the Congress. As government has become larger and increasingly complex, it has naturally turned to the GAO for expertise and detailed studies. But that has not changed the independence and objectivity of its findings, conclusions and recommendations.

- With the above comments in mind, I find difficulty in believing that the question of who has the right to take the initiative in the removal of a Comptroller General is a serious point. No action of this type has been initiated in 65 years nor even discussed insofar as I am aware. Moreover, should any President wish to sponsor a joint resolution to remove the Comptroller General, he could have sponsored such a resolution. No President to date has done so. This course of action could have possibly been successful during President Roosevelt's administration when his relationship to the Comptroller General was certainly a very strained one and during a period when the President's political party in Congress had an overwhelming majority. If such action was considered, it was never proposed openly.

- The question of whether the Emergency Deficit Control Act of 1985 constitutes an unconstitutional delegation of Congressional powers is quite another issue. The authorization and appropriation of funds to carry out the activities of the Federal Government is, of course, one of the most fundamental responsibilities of the Congress under the Constitution. That issue goes to the very heart of the Gramm-Rudman-Hollings legislation. In my view, this fundamental issue is involved irrespective of whether the sequestration authority is given to any agency or officer whether located in either the legislative or executive branch.

The President's authority to withhold funds appropriated by the Congress has been clearly spelled out by statutes which have been tested in court decisions over the past 50 years. There is no precedent for the delegation of the sequestration or similar authority such as that contemplated in the Gramm-Rudman-Hollings legislation outside of the Congress. The single exception of which I am aware was authority granted to President Truman at the outset of the Korean War to reduce funds for procurement and construction programs in the amount of $500 million to conserve material and manpower to support the war effort. The clear purpose, however, was not fiscal policy in this case but furtherance of our defense program. I am aware of no other instance of this type.

In summary, I am strongly opposed to the sequestration concept. It is arbitrary and damages highly essential programs which Congress otherwise would not reduce or eliminate. These judgments historically have been made on a case-by-case, program-by-program, basis after careful review by the authorizing and appropriations committees. I do not believe there is a substitute for this approach. Is the Congress willing to give up its Constitutional responsibility for appropriating funds to carry out the statutes enacted by it? Has it examined the far-reaching implications of delegating this responsibility to anyone outside the Congress? Guidelines, even though tightly drawn, do not solve this basic problem.

The Congress has a clear and important responsibility for oversight as to the implementation of laws enacted by it. The executive agencies are accountable to the Congress in carrying out their statutory responsibilities. Is there not an incompatibility, an inconsistency, in delegating the decisionmaking as to fiscal resources available for the execution of governmental programs and this oversight responsibility? I believe there is.

In conclusion, I strongly recommend against any change in the statute governing how the Comptroller General is appointed, how he is removed, or in his tenure and retirement. These provisions have been carefully crafted to assure independence and credibility in the Office. They have served the Nation well. If the GAO's greatest asset--its credibility and objectivity--were to be lost or greatly weakened, the Federal Government and the Nation would be the loser.

****

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

TESTIMONY OF

JAMES C. MILLER III

DIRECTOR

OFFICE OF MANAGEMENT AND BUDGET

Before the

COMMITTEE ON GOVERNMENTAL AFFAIRS

U.S. SENATE

on

THE BALANCED BUDGET AND EMERGENCY DEFICIT

CONTROL ACT OF 1985

July 23, 1986

Mr. Chairman and Members of the Committee: I am pleased to appear before you to discuss the Balanced Budget and Emergency Deficit Control Act of 1985, the Gramm-Rudman-Hollings (G-R-H) Act. My testimony today deals with the impact of G-R-H to date and the outlook for the future in light of the recent Supreme Court decision.

In holding that the Comptroller General's role in the Act's sequester process was unconstitutional, the Supreme Court left unaffected the Act's deficit reduction targets. The Administration remains committed to meeting these goals. The Court also stayed its order through September 5th to permit Congress to implement the fallback provisions of the law and to decide whether to affirm the sequestration then in effect for FY 1986. I am very pleased Congress acted promptly in the affirmative, and I anticipate the President's signing the joint resolution as soon as it reaches his desk.

As you know, G-R-H limited the size of the outlay sequester in FY 1986 to $11.7 billion. Under the President's order of last February, non-defense programs subject to sequestration were reduced by 4.3 percent. The across-the-board cut for defense programs was 4.9 percent. In furtherance of the Act's provisions, we issued guidance to the agencies urging them to minimize the impact of the sequester on the civilian workforce and to absorb the cuts in a manner generally consistent with good management practices. Most agencies were able to achieve these goals with little difficulty.

A number of agencies, including the Department of Defense and the Library of Congress, had difficulty -- in major part because they were cut more by the regular appropriations bills than by the sequester. But such cases were fairly isolated. For example, last May, OMB informally surveyed major agencies to ascertain the likely effects of sequestration on the Federal civilian workforce (including the civilian portion of the Department of Defense). Out of about 2,120,000 in total FTE civilian employment, excluding the Postal Service, G-R-H and other factors were expected to lead to about 5,000 fewer FTE's for the year, with almost all reductions accommodated through attrition; hardly any (less than 100) FTE reductions were expected to be the result of compulsory reductions-in-force (RIFs).

Earlier this month, we undertook another informal survey and found that, with rare exception, the total deductions are now estimated to be considerably lower -- in large measure because of additional funding for key initiatives contained in the recently-enacted Urgent Supplemental. Although the number of RIFs remained the same, the total number of planned furloughs due to G-R-H has declined by 80 percent.

While it now seems clear that agencies were able to absorb the FY 1986 sequester without major disruptions -- not only to personnel but in terms of the services and other benefits provided -- it should be noted that a further sequester for FY 1987 of any magnitude would have much more serious consequences. Thus, the Administration believes it is essential for Congress to enact spending legislation that achieves the $144 billion deficit target for FY 1987 through targeted cuts and reforms without sacrificing our national defense or raising taxes.

Currently we are in the process of updating the Adminstration's budget and plan to issue a revised deficit estimate early next month. However, I should tell you that it is becoming increasingly clear that recent economic developments and other factors have made it more difficult to meet the FY 1987 deficit target than either the Administration or Congress anticipated just a few months ago. On the other hand, we do believe that it is possible to hold the line on the deficit without jeopardizing our national defense capability or raising taxes. The revised deficit estimate based on modifications in the President's budget that we will issue next month will be in accord with the G-R-H target of $144 billion for FY 1987.

Of course, the report just mentioned is the Mid-Session Review, which was due to be released on July 15th. Unfortunately, as in recent years, we were not able to meet the July 15th date. This year there were two major reasons for delay. First, we needed to incorporate the effects of the recently-enacted Urgent Supplemental, and it simply wasn't possible to accomplish this in this time provided. Second, as you know, we are experiencing considerable uncertainty right now over the pace and direction of economic activity, so it seemed highly propitious for the Mid-Session Review to reflect the government's second (calendar-year) quarter 1986 preliminary growth figures, due out on July 22nd. Thus, we expect to publish the Mid-Session Review the first of next month.

Now, let me turn my attention to the G-R-H report due on August 20th, and I want to stress at the outset that, by law, it will reflect different assumptions than the Mid-Session Review. Thus, there is every reason to anticipate that its projection of the FY 1987 deficit will be different than the one contained in the Mid-Session Review. I wish to stress this point because I am very sensitive to the confusion that may well be generated when we release two different deficit estimates so close together.

The major assumptions required by the G-R-H report of August 20th are as follows:

- For receipts, we must assume continuation of current law; excise taxes dedicated to trust funds are assumed extended at current levels.
- For appropriated programs, we must assume enacted FY 1987 levels. For those accounts where Congress has not enacted full-year appropriations for FY 1987, we must assume a continuation of levels appropriated for FY 1986.
- For programs that are not appropriated, such as social security and offsetting receipts, we must assume continuation of current law.

These rules, then, are used to develop what is known as the "Gradison-baseline," after Congressman Bill Gradison, who sponsored this solution to problems attendant with forecasting likely Congressional action on receipts and appropriations.

As you know, under G-R-H our report of August 20th is submitted along with a similiar report by the Congressional Budget Office (CBO). Not surprisingly, because so many conceptional issues have to be resolved in applying the Gradison baseline, there may well be slight differences between the two agencies. In principle, we tend to read the Act as written whereas CBO tends more towards gleaning the Act's intent. Nevertheless, it is my hope that we can resolve all the conceptual differences before the joint report is published on August 20th.

In all likelihood, both OMB and CBO will conclude in their reports of August 20th that the FY 1987 deficit will exceed $154 billion, thus indicating that a sequester will be necessary unless Congress acts. Then, of course, OMB and CBO will submit another joint report on October 6th, reflecting the same baseline rules but also reflecting any interim Congressional action that affects the deficit.

Let me address one final issue. Senators Gramm, Rudman and Hollings have proposed to amend G-R-H by placing ultimate responsibility for the estimates with the Director of the Office of Management and Budget. Specifically, their proposal would continue to have OMB and CBO report to GAO. But rather than have GAO issue the final report to the President, GAO would now report to OMB. OMB would then report to the President and to Congress, and the Presidential order would be based on the final OMB report.

We support efforts to improve G-R-H. The promise this law made to the American people must be fullfilled.

As we understand the proposed amendment, it would correct the constitutional problem the Supreme Court found. The final report would be issued by an official serving at the pleasure of the President, the Director of OMB. Moreover, the Director would not be legally required to use legislative branch numbers in his final report, either by averaging or otherwise. However, he or she would be subject to the same constraints the Comptroller General was under in the original version of G-R-H.

Mr. Chairman and Members of the Committee: that completes my statement. Now I shall be happy to address your questions.

STATEMENT

OF

ERNEST GELLHORN*/

Before the

Committee on Governmental Affairs
United States Senate

HEARING ON

POSSIBLE ALTERNATIVES TO AUTOMATIC DEFICIT REDUCTION
PROVISIONS DECLARED UNCONSTITUTIONAL IN
BOWSHER V. SYNAR

July 23, 1986

---

*/ Jones, Day, Reavis & Pogue, Washington, D.C.

I appreciate the Committee's invitation to share my views on possible alternatives to the automatic deficit reduction provisions of the Gramm-Rudman-Hollings law[1] that were recently declared unconstitutional by the Supreme Court.[2] As noted in your invitation, the various alternatives offered to "fix" Gramm-Rudman-Hollings would each have constitutional and legal consequences. My purpose today is to sketch out some of the possible courses of action that are available to Congress within the constitutional parameters of the Court's decision.

In deciding on a course of action, however, this Committee and, indeed, Congress as a whole, must weigh these constitutional considerations against other factors. While I will touch only briefly on such factors, I believe it is important to consider the practicality of the proposed solution as well as its likely constitutionality. Thus, for example, it is important to ask what is the likelihood that the proposed alternative sufficiently reflects a majority view and will, in fact, become enacted into law without undue delay. Second, one should ask whether the profferred mechanism will actually achieve the critical national goal of deficit reduction in an expeditious and effective manner. Finally, it is appropriate to consider the effect of the proposed remedy on the larger political question of the overall relationship between the legislative and executive branches. Does it place primary responsibility on politically accountable officers?

---

[1] Balanced Budget and Emergency Deficit Control Act of 1985, P.L. No. 99-177, 99 Stat. 1037.

[2] Bowsher v. Synar, No. 85-1377, 54 U.S.L.W. 5065 (U.S. July 7, 1986).

I am not suggesting that these considerations should be paramount. Indeed, in case of any conflict between these concerns and constitutional requirements, there is no doubt as to which must yield. As the Supreme Court stated in INS v. Chadha, 462 U.S. 919 (1983):

> [T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives -- or the hallmarks -- of democratic government.

Id. at 944. Yet such considerations are appropriately reviewed by policy-makers, for the perfect constitutional solution will be of little benefit if it fails in attaining its intended goal.

As has been recognized in arranging this hearing, however, the initial question for this body is what are the constitutional limitations on its choice of action. The logical starting point for this analysis is what the courts have told us in their review of the previous legislation.

I. Constitutional Limitations

By now the key provisions and judicial history of the Gramm-Rudman-Hollings Act are well known, so I will only summarize them briefly. In order to control the growing budget deficit, the Act set maximum deficit spending limitations for each fiscal year, 1986 through 1991, progressively reducing the deficit to zero by 1991. If, however, in any year the estimated budget deficit exceeded the prescribed maximum by more than a specified amount, the Act required across-the-board budget cuts in federal spending to achieve the targeted deficit level.

These actions were to be accomplished through the automatic deficit reduction provisions established by section 251 of the Act. Under these provisions, the directors of the Office of Management and Budget ("OMB") and the Congressional Budget Office ("CBO") would submit deficit estimates and program-by-program budget reduction calculations to the Comptroller General who, after reviewing their reports, would submit his own report to the President.3/ The President in

---

3/ Thus, for example, under section 251(b), the Comptroller General must specify levels of anticipated revenue and expenditure that determine the gross amount to be sequestered and the particular budget items that are required to be reduced by the various provisions of the Act.

turn would be required under section 252 to issue a sequestration order mandating the spending reductions specified by the Comptroller General.4/ This order would become effective unless Congress acted within a specified time to pass legislation eliminating the need for sequestration.

Because of the constitutional concerns raised by this mechanism, the Act also contained a "fallback" deficit reduction provision. Under this approach, the report prepared by the OMB and CBO Directors would be submitted directly to a specially-created Temporary Joint Committee on Deficit Reduction. Within five days, the committee would be required to submit a joint resolution to both Houses, setting forth a deficit reduction proposal based on the Directors' report. If the joint resolution were passed and signed by the President, it would form the basis of the presidential sequestration order under section 252.

Under the Act's provision for expedited judicial review,5/

4/ The lack of presidential discretion in this regard is illustrated by the fact that the Comptroller General is explicitly directed in section 253 to report to the Congress on the extent to which the President follows his instructions.

5/ Subsection 274(a)(1) of the Act provided for expedited judicial review and authorized any Member of Congress to bring an action in the U.S. District Court for the District of Columbia "for declaratory and injunctive relief on the ground that any [Presidential] order that might be issued pursuant to section 252 violates the Constitution." This section further facilitated judicial review by broadly designating those who may bring suit to challenge the Act.

a suit challenging the constitutionality of the statute was filed in the United States District Court for the District of Columbia by Congressman Synar and others. In a per curiam opinion, a three-judge court found that the Act unconstitutionally vested executive branch powers in an agency under legislative control and thus invalidated the reporting procedures. Synar v. United States, 626 F. Supp. 1374 (D.D.C. 1986).

How did the court reach this conclusion? It found that the actions of the Comptroller General in preparing the report on sequestration were of a type properly exercised only by the Executive Branch. 626 F. Supp. at 1400. Under the 1921 Budget Act, however, the Comptroller General, while appointed by the President with the advice and consent of the Senate, is removable not only by impeachment but also by joint resolution of Congress for specified causes including inefficiency and neglect of duty. See 31 U.S.C. § 703(e)(1) (1982). This "relative technicality of authority over the Comptroller General's removal"6/ became the key to the court's invalidation of the reporting mechanism. The court found:

> [S]ince the powers conferred upon the Comptroller General as part of the automatic deficit reduction process are executive powers, which cannot be constitutionally exercised by an officer

---

6/ 626 F. Supp. at 1403.

> removable by Congress, those powers cannot be exercised and therefore the automatic deficit reduction process to which they are central cannot be implemented.

Id. at 1403.

On expedited direct appeal, the Supreme Court affirmed the lower court's decision. Bowsher v. Synar, No. 85-1377, 54 U.S.L.W. 5064 (U.S. July 7, 1986). A majority of the Court found that, under the constitutional principle of separation of powers, Congress cannot reserve for itself the power to remove an officer charged with the execution of the laws except by impeachment. Similarly, because Congress possessed removal authority over the Comptroller General, he may not be entrusted with executive powers. By placing responsibility for the execution of the Act in an official who is subject to removal only by Congress, Congress in effect retained for itself control over the Act's execution and thus unconstitutionally intruded into the executive function. 54 U.S.L.W. at 5069-70.

In voiding the reporting procedures, the Court refused to consider whether the appropriate remedy was to nullify the 1921 statutory provision authorizing Congress to remove the Comptroller General rather than to invalidate section 251 of the Act. Because Congress had explicitly provided "fallback" provisions to take effect if any of the reporting procedures described in section 251 were invalidated, the Court concluded that congressional intent appeared to have been for these fallback provisions to be given effect as written. Id. at 5070.

The general agreement of the three-judge court panel and the Supreme Court majority on the separation of powers issue was not shared by the four Justices who wrote separately. Justicies Stevens and Marshall concurred in the Court's judgment that the statute was constitutionally infirm, but found this infirmity in an impermissable delegation of legislative powers to the Comptroller General. Id. at 5070.

Justices White and Blackman dissented in separate opinions. Justice White found that the congressional removal power over the Comptroller General "presents no substantial threat to the basic scheme of separation of powers" (id. at 5077), and concluded that "[r]eliance on such an unyielding principle [of separation of powers] to strike down a statute posing no real danger of aggrandizement of congressional power is extremely misguided and insensitive to our constituional role." Id. at 5081. Justice Blackman would not reach the separation of powers question because of his view that any incompatibility between the Comptroller General's functions and the congressional removal power "should be cured by refusing to allow congressional removal -- if it is ever attempted -- and not by striking down the central provisions of the Deficit Control Act." Id at 5081.

II. Possible Alternatives

The scholarly and well-crafted judicial opinions analyzing the original Gramm-Rudman-Hollings legislation provide a relatively clear roadmap with respect to the constitutional issues associated with the separation of powers questions posed by the Act. They give their imprimatur to two approaches representing obvious solutions for resolving the constitutional questions: nullification of the 1921 Budget Act to eliminate the congressional removal power, or elimination of the Comptroller General's reporting function and reliance on the "fallback" deficit reduction proposal. Each of these proposals merits further consideration.

In light of the Court's opinion, one approach to "fix" Gramm-Rudman-Hollings would be to correct the constitutional infirmity associated with the congressional removal provision. Legislation to nullify the 1921 statute authorizing Congress to remove the Comptroller General would cure the separation of powers problem created by congressional retention of the power to remove an officer charged with execution of the laws. However, it would also necessarily affect a wide array of functions of the Comptroller General in addition to those under Gramm-Rudman-Hollings. In addition, to the extent that the removal provision was seen as a necessary protection against perceived executive branch biases in the deficit reduction process, elimination of the provision would clearly affect the extent of congressional influence and oversight.

This is where the precise mechanism chosen as a substitute for the invalidated removal provision becomes significant. To have the Comptroller General removable only by impeachment would presumably create the maximum independence from both branches.[7] Whether this is desirable given the highly political and controversial nature of the choices to be made in the deficit reduction process is another question.

The removal standard suggested in proposed legislation accompanying your invitation -- removal by the President for "inefficiency, neglect of duty, or malfeasance in office" -- would certainly accord with the executive branch functions identified by the Court.[8] But this standard would probably

---

[7] The impeachment clause contained in Article II, § 4 provides that "civil officers of the United States shall be removed from Office on Impeachment for, and conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

[8] This is the standard reviewed by the Supreme Court in Humphrey's Executor v. United States, 295 U.S. 602 (1935), a suit for back pay by a commissioner of the Federal Trade Commission ("FTC") who was removed without cause by President Roosevelt. In one of the key separation of powers opinions, the Court concluded that this statutory language barred removal for other causes and that such a limitation was constitutional because an officer of an independent agency like the FTC "occupies no place in the executive department" and acts only "in the discharge and effectuation of . . . quasi-legislative or quasi-judicial powers, or as an [officer of an] agency of the legislative or judicial departments of the government." 295 U.S. at

[Footnote continued on next page]

be least satisfactory in terms of congressional involvement. Similarly, to make the Comptroller General removable by the President only in the case of "extraordinary improprieties" -- the standard established for the special prosecutor and analyzed in Nader v. Bork 9/ -- would also reflect the office's executive ties. The choice among these standards thus becomes one not so much dictated by constitutional necessity as governed by an attempt to shape the perception and functions of the office and the willingness of the legislative branch to confront the hard political choices required by the deficit reduction price.

Moreover, it should be recognized that the elimination of the congressional removal provision does not necessarily resolve all of the constitutional concerns created by the Comptroller General's involvement in the deficit reduction process. First, it does nothing to address the various delegation of powers issues raised by this mechanism. The three-judge court, in a lengthy analysis frankly acknowledged as *dicta*,10/ concluded that the procedure established in

---

8/ [Footnote continued from previous page]

628. The Court found that, for such officers, Congress may fix the term of office and forbid their removal except for cause. Id. at 629.

9/ 366 F. Supp. 104 (D.D.C. 1973); see 38 Fed. Reg. 30738 (November 9, 1973).

10/ 626 F. Supp. at 1382-83.

section 251 did not involve an unconstitutional delegation of power.11/ The Supreme Court, however, did not find it necessary to consider this issue (54 U.S.L.W. at 5070 n.10), which is thus presumably open to further judicial scrutiny.

The delegation doctrine (or nondelegation doctrine as it is perhaps more accurately termed) is an ancient principle that is captured in the statement by John Locke that "The Legislative cannot transfer the Power of Making Laws to any other hands."12/ The doctrine thus theoretically constrains congressional transfers of authority,13/ although the number of actions actually invalidated under this principle suggests the unwillingness of the courts to in fact limit such transfers.14/ As framed by the Supreme Court, the delegation doctrine essentially involves two inquiries: (1) can the particular power be delegated at all, and (2) is the manner of

---

11/ Id. at 1391.

12/ J. Locke, Two Treatises of Government 380-81 (2d Treatise) (Cambridge University Press, 1960).

13/ See Aranson, Gellhorn, & Robinson, "A Theory of Legislative Delegation," 68 Cornell L. Rev. 1 (1982).

14/ Indeed, in the half century since a trio of decisions invalidating aspects of the New Deal (Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); and Carter v. Carter Coal Co., 298 U.S. 236 (1936)), no Court majority has applied the delegation doctrine to invalidate legislation. Aranson, Gellhorn, & Robinson, supra note 13, at 10.

delegation accompanied by sufficient standards to withstand constitutional scrutiny.

While one could argue that the power over the budgetary and fiscal issues here strikes so close to core legislative functions that it cannot be delegated under any circumstances,15/ I do not find this position persuasive. As noted by the three-judge court, there is nothing in the Constitution to distinguish "core" legislative functions from all others. 626 F. Supp. at 1391. In addition, past delegations to the executive in related areas such as establishing the amount of customs duties on imported goods appear to refute the theory. See, e.g., J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 266 (1928).

A separate legislative delegation issue was identified in Justice Stevens' concurring opinion. Stevens disagreed with the majority's characterization of the functions of the Comptroller General under the automatic deficit reduction law and concluded that the functions are legislative in nature. Thus, under constitutional principles most recently expressed in INS v. Chadha, 426 U.S. 919 (1983) (invalidating the legislative veto), Congress may not exercise its fundamental power to formulate national policy by delegating that power to

---

15/ See, e.g., Brooks, "Gramm-Rudman: Can Congress and the President Pass This Buck?", 64 Tex. L. Rev. 131 (1985).

one of the two Houses, to a legislative committee or to an individual agent such as the Comptroller General. 54 U.S.L.W. at 5070.

The premise underlying this theory -- that decisions regarding the deficit reduction process are legislative in nature -- was rejected by both the majority and the dissenting Justices, and there appear to be seven votes supporting the conclusion that the Comptroller General's functions under the Act are executive functions. While this conclusion has strong support, despite the amount of discretion conferred on the Comptroller General under Gramm-Rudman-Hollings I, it reflects a further delegation issue posed by the present statutory scheme.

The basic constitutional impediment created by Gramm-Rudman-Hollings in my view was not so much the power given the Comptroller General as its invasion of the President's prerogatives. There is, it seems to me, an anomaly created by having the President irreversibly bound by the decision of the Comptroller General, a subordinate official. Under the original statute, the President was allowed no discretion to alter or modify the report made by the Comptroller General but was required simply to implement this report in a sequestration order. Thus, in a real sense, the President was carrying out a ministerial function and implementing a policy decision made by the Comptroller General.

The allocation of discretion in this sequence of events seems fundamentally misplaced. A preferable approach might be to reverse the exercise of discretion by having the Comptroller General's report to the President be in the nature of recommendations rather than a mandatory course of action. The President thereafter would have the discretion to adopt, modify, or otherwise change these recommendations.

This course would allow the tough policy choices required by the deficit reduction process to be made in a highly visible manner and by a politically accountable actor. The possible alternative of allowing the President only to accept or to veto the Comptroller General's report would likely prove less satisfactory, since it would permit the President to "duck" these tough choices. In addition, a presidential veto would most likely start the whole process running again, a most undesirable outcome given the need for timely action.

The obvious congressional concerns with placing this amount of control over the deficit reduction process in the hands of the executive branch could be addressed in two ways. First, the legislative enactment establishing this procedure should contain whatever specifically enumerated standards Congress determines are necessary to circumscribe the choices available to the Comptroller General and subsequently to the President. In addition, the legislation should also require that specific factual findings be made by the President to support the deficit reduction choices.16/ These findings would provide the basis for judicial review of the deficit reduction decision.17/ Second, as provided by the current statute, Congress could retain the last word through the possibility of subsequent legislative action (eliminating the need for the sequestration order) that would prevent the order from taking effect.

A second option clearly identified by the court opinions would be to rely on the current "fallback" alternative, namely, reliance on a joint congressional committee to reconcile the OMB and CBO reports and passage of a joint

---

16/ One example of such a fact-finding requirement on the President is contained in the Connally Hot Oil Act of 1935, 49 Stat. 31 (1935), 15 U.S.C. § 715c, curing the constitutional defects in Panama Refining, supra note 14.

17/ See Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126, 144 (1941) ("where . . . the standards set up for the guidance of the administrative agency . . . are such that Congress, the courts and the public can ascertain whether the agency has conformed to the standards which Congress has prescribed, there is no failure of performance of the legislative function").

Section 274(h) of the Act currently contains a limited preclusion of judicial review by providing that "the economic data, assumptions, and methodologies used by the Comptroller General in computing the base levels of total revenues and total budget outlays . . . shall not be subject to review in any judicial or administrative proceeding." This preclusion was found acceptable by the three-judge court (626 F. Supp. at 1389-90) and would not be inconsistent with the suggested requirement for presidential fact-finding.

resolution as the basis for the sequestration order. In addition to its constitutional soundness, the fallback proposal has the further advantage of prior legislative consensus (or compromise), which was responsible for its enactment in Gramm-Rudman-Hollings I. Indeed, just last week this procedure was relied on to ratify $11.7 billion in fiscal 1986 spending reductions ordered last March and voided by the Court in Bowsher.18/

Yet despite this apparent initial success, some of the practical considerations referred to above may limit the future effectiveness of this procedure. For example, by requiring a joint resolution as the basis for the Presidential sequestration order, the fallback proposal raises a serious potential for legislative gridlock. Despite the special rules and facilitating procedures (*e.g.*, amendments are out of order) contained in the Act, the legislative forum may simply prove to be inadequate for resolving these issues in a timely fashion. Moreover, the need for repeated action by the legislative branch required by this approach would likely delay not only budgetary but also other legislative functions.

Beyond these fairly obvious solutions to the constitutional problems posed by Gramm-Rudman-Hollings, there

---

18/ *See* Fuerbringer, "Congress Votes Cuts Court Voided," *N.Y. Times*, July 17, 1986, A1.

are other options that I will touch on briefly. One, of course, would be to give up the search for innovative solutions and to rely on the traditional budgetary process, with its well-defined roles for the executive and legislative branches, to achieve debt reduction. The obvious criticism of this alternative is that such a course has not been singularly successful in the past and there is little reason to suspect that this result would change in the future. While this approach would clearly be faithful to original concept of how budgetary questions were to be resolved, such procedures were unquestionably shaped by a simpler age.

An alternative perhaps arising from the other end of the spectrum would be to pursue the concept of a presidential line-item veto. In addition to the obvious questions associated with the limitations on congressional power that would result from this approach, the immediate delay that would inevitably be required by the process of constitutional amendment is, in itself, probably sufficient to reject this option.

More promising alternatives might be to eliminate the Comptroller General's involvement in the sequestration process altogether by giving his functions to an executive branch entity (such as the Office of Management and Budget) or to an independent agency or official (the Chairman of the Federal Reserve Board has been suggested). In addition to providing a constitutionally acceptable alternative, this approach has several attractive features. It would permit the development of specialized expertise about fiscal matters; it would not affect other existing functions of the Comptroller General; and it would eliminate the need for frequent legislative action (and, at the same time, the necessity for elected officials to take a stand on controversial issues).

On the minus side, the establishment of any new entity would add to the bureaucratic superstructure, almost certainly in contravention of the deficit reduction efforts the entity was seeking to implement. The alternative of grafting on the deficit reduction functions onto an existing executive official or independent agency would probably add significantly to existing workloads. This approach would also likely require a fairly elaborate statutory scheme incorporating necessary standards and safeguards to avoid a challenge on delegation issues. And it has the potentially undesirable effect of shifting the primary responsibility for deficit reduction to less accountable and less visible government officials.

3. Summary and Conclusions.

Within the constitutional limitations identified by the Court's opinion in Bowsher v. Synar, a fairly broad range of choices are available to implement the automatic deficit reduction goals of the original Gramm-Rudman-Hollings Act. (Indeed, in my view, of the options that have been advanced, perhaps the only one that would prove unconstitutional would be reliance on a subordinate legislative entity in contravention of the Court's ruling in Chadha.)

Of the options I have discussed, my preference would be to modify the prior statutory scheme and to place the ultimate decision for the automatic deficit reduction process in the hands of the President, who would be given discretion to modify the Comptroller General's recommendation by making specific findings of his own. While correcting the constitutional defect identified by the Court, this approach hews closest to the prior statute. As such, it reflects both a congressional and presidential commitment to the deficit reduction process. It relies on the specialized expertise of both OMB and CBO in the evaluation and recommendation stages, and permits the Comptroller General to perform a reconciliation function. What it adds is final review and approval by the President, constrained by a fact-finding requirement. This ensures that the ultimate decision is visible and subject to political accountability.

ERNEST GELLHORN

Address and Personal Data

Jones, Day, Reavis & Pogue
Metropolitan Square
655 15th Street, N. W.
Washington, D. C. 20007-5701
Office: 202/879-3939

Born: 1935
Married
2 children

Education

Law School: Univ. of Minnesota, LL.B., magna cum laude, 1962; Law Review 1960-62 (Note Editor 1961-62); Order of the Coif
College: Univ. of Minnesota, B.A., cum laude, 1956; Phi Beta Kappa

Employment

1986-	Regional managing partner, Jones, Day, Reavis & Pogue, Wash., D.C.
1982-86	Dean and Galen J. Roush Prof. of Law, Case Western Reserve Univ.
1979-82	T. Munford Boyd Prof. of Law, Univ. of Virginia
1978-79	Dean, School of Law, Univ. of Washington
1975-78	Dean, College of Law, Arizona State Univ.
1970-75	Prof. of Law, Univ. of Virginia
1966-70	Assoc. Prof. and Prof. of Law, Duke Law School
1962-66	Associate, Jones, Day, Cockley & Reavis, Cleveland, OH
Also:	Sr. Counsel, Commission on CIA within the United States (Rockefeller Commission), spring 1975 Visiting Prof. of Law: Michigan, summer 1975; Tennessee, winter 1974; Wayne State, summer 1971

Honors

Alumni Distinguished Lecture in Jurisprudence, Univ. of Tennessee, Fall 1981
American Bar Foundation Fellow, elected 1983
American Law Institute, elected 1976
Baron deHirsch Meyer Lecturer, Univ. of Miami Law School, 1975
Cambridge-Tilburg Lecturer, Tilburg, Netherlands, 1982
Guggenheim Fellowship, 1981-82
USIA Lecturer, Netherlands, 1982; Nepal and West Germany, 1984

Professional Organizations and Boards (selected):

American Bar Association:
- Administrative Law Section, Council Member, 1984-
  - Antitrust Committee, Chair, 1982-84
  - Rulemaking Committee, Chair, 1972-73
- Antitrust Law Section, Industry Regulation Committee, Chair, 1977-79
- Section on Legal Education
  - Accreditation Inspections: Chair - USF, 1980; UCLA, 1981; Washington Univ. (St. Louis), 1984. Participant - Detroit, 1972
  - Liaison on Continuing Education, 1981-83

Standing Committee on Law & National Security, Working Group on Freedom of Information Changes, 1981-
Arizona Prosecuting Attorneys Council, 1977-78
Arizona State Bar Association, Board of Governors, 1976-78
Association of American Law Schools:
    Nominating Committee, 1985
    Section on Administrative Law, chair, 1972-74
    Special Committee on Bakke, chair, 1977
    Section on Administration of Law Schools, chair, 1978
    Special Committee on Scholarly Papers, 1985
    Committee on Academic Freedom and Tenure, 1979-82
Citizens Communications Center, Board of Directors, 1978-81
Cleveland Charter Review Commission, Fall 1983
Commission on Undergraduate Education, Case Western Reserve Univ., 1984-85
Emory Law School Visiting Committee, 1982-84
Federal Trade Commission Advisory Rules Council, 1970-74
Pacific Legal Foundation, College of Public Interest Law, Bd. of Directors, 1977-
Phi Delta Phi Legal Institute, Research Advisory Board, 1979-
U.S. Supreme Court, Ariz. D.C., Ohio, and Va. bars
U.S. Civil Rights Commission, Ohio Advisory Committee, 1985-
University Circle, Inc., Board of Trustees, 1983-86
University of Miami Law & Economics Center Visiting Committee, 1981-84
Univ. of Va. Center for Law & National Security Advisory Board, 1981-

Consultant, Speeches and Testimony (selected):

Administrative Conference of the United States, 1969-77
American Council on Education, Committee on Self-Regulation Initiatives, 1978-85
Aspen Institute, Project on Communications Policy, 1976-78
Assoc. of American Law Libraries, Annual Meeting, keynote speaker, June 1982
Continuing Legal Education, frequent lecturer in administrative and antitrust law
Duke Law Journal Administrative Law Project, 1969-
Federal Judicial Center, 1980-86
Federal Trade Commission, 1972-74; 1981-85
HEW, Study of Disputes Resolution, 1976
Law and Society Assoc. (U.K.), Annual Meeting, keynote speaker, April, 1982
National Assoc. of State Universities and Land Grant Colleges, Committee on Regulatory Reform, 1981-83
National Science Foundation, occasional consultant, 1981-86
President's Office of Consumer Affairs, 1968-72
Several law firms, corporations or associations on selected administrative and antitrust law matters, 1969-86
Supreme Court Economic Review, Editorial Advisory Board, 1979-84
U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Monopoly, 1980, 1983-84
U.S. Senate Committee on Government Operations, 1972-75
U.S. Senate Judiciary Committee, 1967, 1977, 1981-86

5/86

LIST OF PUBLICATIONS

Articles:

Limitations on Contract Termination Rights—Franchise Cancellations, 1967 Duke Law Journal 465-521 (1967)

The Treatment of Confidential Information by the FTC: The Hearing, 116 Univ. of Pennsylvania Law Review 401-34 (1968)

The Treatment of Confidential Information by the FTC: Pretrial Practices, 36 Univ. of Chicago Law Review 113-84 (1968)

The Law Schools and the Negro, 1968 Duke Law Journal 1069-99 (1968)

Franchise Terminations: Some Problems, Pitfalls and Proposals, chapter 3 (pp. 57-78, 253-66) in THE FRANCHISING PHENOMENON (Rice ed. 1969)

Proof of Consumer Deception before the FTC, 17 Kansas Law Review 559-72 (1969)

Braking the Cigarette Habit, 3 Journal of Consumer Affairs 145-51 (1969)

Business Secrets in Administrative Agency Adjudication, 22 Administrative Law Review 515-27 (1970)

Summary Judgment in Administrative Adjudication, 84 Harvard Law Review 612-32 (1971) (with G. Robinson)

Rules of Evidence and Official Notice in Formal Administrative Hearings, 1971 Duke Law Journal 1-50, revised as chapter 37 (pp. 836-63) in MC CORMICK ON EVIDENCE (Cleary ed. 1972); id., ch. 37 (1004-33) (3d ed. 1984)

Interlocutory Appeal Procedures in Administrative Hearings, 70 Michigan Law Review 109-46 (1971) (with P. Larsen)

Legal Effect of Advice Given under the Anti-Inflation Law, 17 The Practical Lawyer 13-25 (1971)

Public Participation in Administrative Hearings, 81 Yale Law Journal 359-404 (1972)

Adverse Publicity by Administrative Agencies, 86 Harvard Law Review 1380-1441 (1973)

The FTC and the Role of Rulemaking, 28 Food, Drug, Cosmetic Law Journal 736-42 (1973)

Constitutional Limitations on Admissions Procedures and Standards—Beyond Affirmative Action, 60 Virginia Law Review 975-1011 (1974)(with D. Hornby)

An Introduction to Antitrust Economics, 1975 Duke Law Journal 1-43 (1975)

Perspectives on Administrative Law, 75 Columbia Law Review 771-99 (1975) (with G. Robinson)

Some Questions on Mandating Continuing Legal Education, 12 Arizona State Bar Journal, pp. 7-8 (Summer 1976)

Congressional Control of Administrative Regulation: A Study of Legislative Vetoes, 90 Harvard Law Review 1369-1440 (1977) (with H. Bruff)

The New Gibberish at the FTC, 2 Regulation, pp. 37-43, May-June 1978

Government and Education: The University as a Regulated Industry, 1977 Arizona State Law Journal 569-97 (with B. Boyer), revision of The Academy as a Regulated Industry in GOVERNMENT REGULATION OF HIGHER EDUCATION, chapter 3 (pp. 25-26) (W. Hobbs ed. 1978)

The Role of Congress, chapter 13 (pp. 445-62) in COMMUNICATIONS FOR TOMORROW (ed. G. Robinson 1978)

Physician Advertising: The First Amendment and the Sherman Act, 1978 Duke Law Journal 543-85 (with W. Canby)

Reform as Totem—A Skeptical View, 3 Regulation, pp. 23-26, May-June 1979

The National Commission to Review Antitrust Law and Procedure's Deregulatory Philosophy, 48 Antitrust Law Journal 541-54 (1979)

The Wages of Zealotry: The FTC under Siege, 4 Regulation, pp. 3-40, January-February 1980

Introduction—The Burger Court: Reflections on the First Decade, 44 Law and Contemporary Problems 4-6 (Summer 1980)

Rulemaking Due Process: An Inconclusive Dialogue, 48 University of Chicago Law Review 201-62 (1981) (with G. Robinson)

Regulatory Reform and the Federal Trade Commission's Antitrust Jurisdiction, 49 Tennessee Law Review 471-510 (1982), revised as *Two's a Crowd: The FTC's Redundant Antitrust Powers*, Regulation, pp. 32-34, November-December 1981

Antitrust and Trade Regulation, (symposium on "Reagulation—The First Year"), Regulation, pp. 22-24, January-February 1982

Introduction—The Developing Role of Law and Lawyers in China, 46 Albany Law Review 687-690 (1982)

A Theory of Legislative Delegation, 68 Cornell Law Review 1-67 (1982) (with P. Aranson and G. Robinson)

The Role of Economics in Legal Education Today, 33 Journal of Legal Education 247-73 (1983) (with G. Robinson)

Government Merger Policy and Practice—1983, 52 Antitrust Law Journal 419-34 (1983)

Trading Stamps, S&H and the FTC's Unfairness Doctrine, 1983 Duke Law Journal 903-58 (1983)

Making Sense Out of the Rule of Reason, 35 Case Western Reserve Law Review 155-82 (1984-85) (with T. Tatham)

Another Perspective on Antitrust Immunity for Petitions to Government, in FTC Law & Economics Conference, THE POLITICAL ECONOMY OF REGULATION 89-92 (1984)

Administrative Law in Transition, 38 Administrative Law Review 107-14 (1986)

Climbing the Antitrust Staircase, __ Antitr. Bul. __ (forthcoming)

Books

ADMINISTRATIVE LAW AND PROCESS xvii, 336 pp. (West Publishing Co., St. Paul, Minn. 1972); *id.*, 445 pp. (2d ed. 1981) (with B. Boyer); *id.* approx. 450 pp. (3d ed. 1986)

THE ADMINISTRATIVE PROCESS xxxviii, 928 pp. (West Publishing Co., St. Paul, Minn. 1974) (with G. Robinson); *id.*, xxxviii, 959 pp. (2d ed. 1980) (with G. Robinson and H. Bruff) Supplement xi, 182 pp. (1983) (with G. Robinson and H. Bruff); *id.* 982 pp. (3d ed. 1986)

ANTITRUST LAW AND ECONOMICS xix, 416 pp. (West Publishing Co., St. Paul, Minn. 1976); *id.*, 425 pp. (2d ed. 1981); *id.* approx. 450 pp. (3d ed. 1986)

REGULATED INDUSTRIES xxv, 394 pp. (West Publishing Co., St. Paul, Minn. 1982) (with R. Pierce); *id.* approx. 400 pp. (2d ed. 1986)

Book Reviews of:

W. Cary, POLITICS AND THE REGULATORY AGENCIES (1967), 52 Minnesota Law Review 223-29 (November 1967)

E. Cox, R. Fellmuth, & J. Schulz, THE CONSUMER AND THE FEDERAL COMMISSION (1969), 68 Michigan Law Review 151-62 (December 1969)

R. Bork, THE ANTITRUST PARADOX (1978), 92 Harvard Law Review 1376-1390 (April 1979)

S. Breyer and R. Stewart, ADMINISTRATIVE LAW AND REGULATORY POLICY, 93 Harvard Law Review 1384-94 (1980)

R. Katzmann, REGULATORY BUREAUCRACY: THE FTC AND ANTITRUST POLICY (1980), 95 Political Science Quarterly 498-99 (1980)

S. Breyer, REGULATION AND ITS REFORM, 81 Michigan Law Review 1033-39 (1983)

Essays, Reports, and Miscellaneous

Brief for FTC, *National Petroleum Refiners Ass'n v. FTC*, United States Circuit Court of Appeals for the District of Columbia 35 pp. (1972)

Summer Economics Institute for Law Professors, 20 Dicta 1 (March 3, 1973) (with J. Hetherington)

Controlling the Central Intelligence Agency, New York Times, January 19, 1976, at p. 29 (op-ed column)

Dean's Corner

- 12 Arizona State Bar Journal 52-53 (Aug. 1976) ("Why Are We So Depressed?— A Bicentennial View of Election '76")
- 12 Arizona State Bar Journal 42-44 (Oct. 1976) ("Trends in Legal Education")
- 12 Arizona State Bar Journal 33 (Dec. 1976) ("Appellate Advocacy")
- 12 Arizona State Bar Journal 13 (Feb. 1977) ("The Speedy Trial Act of 1974")
- 12 Arizona State Bar Journal 44-45 (Apr. 1977) ("Self-Study")
- 13 Arizona State Bar Journal 69-71 (Dec. 1977) ("Sorting the Arguments on 'Reverse Discrimination'")

Report of the Dean, Arizona State University College of Law, 66 pp. (June 1976); *id.*, 90 pp. (June 1977); Case Western Reserve University, 25 pp. (July 1983); *id.*, 27 pp. (July 1984); *id.*, 21 pp. (July 1985)

Pre-Appointment Review of Appointments to Regulatory Commissions, Report to American Bar Association Section on Antitrust Law, 19 pp. (June 15, 1977), (with R. Freer), revised as *Assuring Competency in Federal Agency Appointments*, 65 American Bar Association Journal 218-220 (1979)

The Impact of the Bakke Decision on the University of Washington's Effort to Provide Equal Educational Opportunities, Report of the Ad Hoc Comm. to Advise President Hogness (Oct. 6, 1978) (with others)

The "Black Lung" Act: An Analysis of Legal Issues Raised Under the Benefit Program Created by the Federal Coal Mine Health and Safety Act of 1969 (As Amended), Monograph, Education and Training Series, (Federal Judicial Center, 1981) 51 pp.

Impressions of China's Legal System, Virginia Law School Report, Fall 1981, at pp. 13-16, 45

Fewer Lawyers Won't Necessarily Help, Cleveland Plain Dealer, November 1, 1983, at p. 5-B

Baxter in the Pantheon of Antitrust, Wall Street Journal, Jan. 6, 1984, at p. 16

Too Much Law, Too Many Lawyers, Not Enough Justice, Wall Street Journal, June 7, 1984, at p. 22

Business Discretion and Antitrust Uncertainty, The Conference Board Research Bulletin 12-13 (Fall 1984)

Midcourse Corrections in Policy, The Conference Board Research Bulletin 15 (Fall 1985)

5/86

STATEMENT OF CASS R. SUNSTEIN

PROFESSOR OF LAW

UNIVERSITY OF CHICAGO

ON THE BOWSHER DECISION, BUDGET DEFICITS, AND THE SEPARATION OF POWERS

before

THE SENATE COMMITTEE ON GOVERNMENT AFFAIRS

ON JULY 23, 1986

Prepared statement of Cass R. Sunstein, Professor of Law, University of Chicago

Mr. Chairman and Members of the Committee:

I am pleased to have the opportunity to appear before you today to discuss the implications of the Supreme Court's decision in Bowsher v. Synar, 54 U.S.L.W. 5064 (July 7, 1986), for the 1985 Balanced Budget and Emergency Deficit Control Act ("Act") and for the separation of powers more generally. My statement will come in three sections. The first section briefly discusses some general points that might be kept in mind in considering the Bowsher case and contemporary separation of powers issues. The second section deals with possible amendments to the Act and the legal questions raised by each. The third and final section ventures some general remarks on the question of "independent" agencies and the independence of the Comptroller General, raised in Bowsher and several other recent cases.

In brief, my conclusion is that the best response to the Bowsher decision would be for Congress to transfer the authority currently vested in the Comptroller General into the hands of the President or his subordinates--preferably, the Office of Management and Budget (OMB). A useful supplement to such a step would be to narrow the discretion of those who implement the Act--by, among other things, ensuring consultation by GAO and CBO and allowing judicial review of all executive branch decisions under the Act under the traditional standards of the

Administrative Procedure Act, 5 U.S.C. 551 et seq. Other possible routes have some advantages, but the risks seem to outweigh the benefits. I also set out some ways to deal with the legal uncertainty surrounding the Comptroller General.

I. Introduction

It will be useful to begin with four preliminary points.

1. The Bowsher case is decided on the narrowest possible ground. The Court ruled that the Act was unconstitutional insofar as it conferred executive powers on an official subject to removal by Congress. Justice Stevens, joined by Justice Marshall, concurred on the somewhat broader ground that Congress could not allow a legislative agent to act without complying with the constitutionally-specified procedures for legislative action.

The Bowsher decision thus leaves a number of issues open, including the legality of other functions of the Comptroller General, the precise status of "independent" agencies, and the validity of various mechanisms for insulating from presidential control those officials who engage in fiscal and regulatory policymaking.

2. There is reason for uncertainty about the current legal status of some or all of the "independent" agencies. The decision in Buckley v. Valeo, 424 U.S. 1 (1976)--invalidating the Federal Election Commission on separation of powers grounds--is in some tension with Humphrey's Executor v. United States, 295 U.S. 602

(1935), the most important decision upholding "independent" agencies. See Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573 (1984). Several recent Supreme Court decisions show a return to the text and history of the Constitution in the interpretation of the doctrine of separation of powers. Such decisions, which include Buckley, INS v. Chadha, 462 U.S. 919 (1983), and the Bowsher decision itself, cast some doubt on the existence of "independent" agencies. Finally, the decision of the lower court in the Bowsher case--written by a panel including Justice-designate Antonin Scalia--includes several passages that question the constitutionality of "independent" agencies. See Synar v. United States, 626 F. Supp. 1374 (D.D.C. 1986). In these circumstances the rationale of Humphrey's Executor is in some question, and perhaps the holding as well.

3. From Congress' point of view, delegation of authority to the President or his subordinates will often have considerable advantages over delegation to an "independent" authority. The President is politically accountable and highly visible. His decisions--if they are understood as his--will receive continuing public scrutiny. If his decisions, including budgetary projections, turn out to be wrong, there should be a political response from Congress and the public at large. The grant of power to the President also has the advantage of minimizing the likelihood of a constitutional infirmity--an important advantage in this context, for the legality of the Act has been uncertain since its enactment in 1985.

Most important, all "executive" agencies--and the President himself--are subject to the lawmaking authority of Congress. Under Article II of the Constitution, the President must "take Care that the Laws be faithfully executed." This provision imposes a duty; it is not a license. When Congress grants authority to an "executive" agency, the agency is ultimately subject not only to the President, but also--and above all--to the standards laid down in the statute.

4. Judicial review of executive action is an important ally of Congress in its efforts to control presidential power. By subjecting the President and his subordinates to judicial review, Congress increases the likelihood that the rules it lays down will actually be obeyed. The mere prospect of judicial review is a deterrent to executive action that flouts congressional will. And if the prospect of review is an insufficient safeguard, the courts are available to compel the executive to adhere to the law as laid down by Congress.

II. Possible Amendments of the Act

With these basic points in mind, I turn to an evaluation of several possible amendments to the Act. All of these possible amendments are designed to ensure that the Act will be consistent with *Bowsher* and that it will otherwise comport with constitutional requirements.

A. *Delegate the authority now vested in the Comptroller General to the President or an executive branch official*. The most natural response to the Bowsher decision would be to vest the powers now granted to the Comptroller General in the President or a subordinate official in the executive branch. This route would eliminate the most significant constitutional objections to the Act. If the authority currently vested in the Comptroller General were placed in the president, there would be little reason to fear a constitutional challenge. If a subordinate is to be given this authority, the most likely candidate is the Office of Management and Budget (OMB)--subject to supervision by the President himself. Perhaps the best approach would be to allow OMB to do the basic work, but to permit the President to exercise his usual supervisory authority. This solution would take advantage of the specialization of OMB without raising constitutional issues associated with requiring the President to follow the orders of a subordinate.

This route would also have the fortunate consequence of minimizing and perhaps eliminating any constitutional obstacle. The three-judge district court in the Bowsher case upheld the Act as against an attack on nondelegation grounds. In my view, its decision in this regard was correct, and it would probably be upheld by the Supreme Court. The Court has not invalidated a statute on nondelegation doctrine grounds in many years, and the discretionary authority conferred by the Act is less substantial than that conferred by many other statutes. It is a large mistake to read the Bowsher decision as if it held that the Act was unconstitutional because it insulated Congress from "making the hard choices." The Court held no such thing, and it is unlikely to do so in the future.

In addition to minimizing the likelihood of a successful constitutional challenge, a decision to confer authority on the President rather than the Comptroller General would have important advantages. Such a decision would make the President accountable for mistakes or improprieties introduced during the calculation process. If "presidential politics" distorted that process, the President would ultimately be held responsible. Moreover, current law allows executive branch officials to perform analogous tasks, and it has not created significant risks. Consider the calculation of the poverty, inflation, and unemployment rates. All of these areas are politically explosive--in some ways more so than the calculations under the Act--but all of them have been handled by the executive branch in a largely professional manner.

There are some counterarguments against this proposal. It might be thought that such a system would limit congressional power over the implementation of the Act. The advantage of the original approach, in this view, is that it permitted an officer subject to congressional control to make some of the important determinations. To confer the relevant authority on executive branch officials, it might be thought, would introduce an undesirable degree of partisan politics into the process and at the same time unduly increase the power of the President. Some might think that the result would be to introduce some of the problems associated with the "line-item" veto.

In my view, there are persuasive responses to all of these objections. Most important, the Act contains significant limitations on the authority of the implementing officials. Regardless of who makes the calculations, Congress has made the basic decisions[1] in the Act. Indeed, Congress itself argued in the Bowhser case that the Comptroller General's authority was "ministerial." Whether or not this characterization is accurate, the principal decisions have been made in the Act itself; the executive branch must adhere to them; and many of them are judicially enforceable. The Act sets out the assumptions to be used in calculating the budget base, in section 251(a)(6); it defines its principal terms, including "deficit," "budget outlays," and "real economic growth"; the various cuts are of an across-the-board nature and have been set out in the Act itself. In its current form, the Act would not empower the President to cut or eliminate those programs of which he disapproved. All of these provisions diminish the authority of the President, and some suggestions are set out below for supplementing these safeguards.

Congress also has at its disposal a number of weapons for policing the determinations of the executive branch. Most important, it retains the ultimate power to override any executive branch calculations to which it objects, and indeed it might incorporate special procedures for expedited congressional review of any executive determinations. These procedures could include a joint resolution to invalidate calculations to which Congress objects or to alter the set of reductions in the Act. Formal and informal mechanisms of control are available.

---

[1] Sometimes the Act is criticized because of the across-the-board nature of the various reductions; Congress does not make particularized decisions about which programs to cut. See Kahn, Gramm-Rudman and the Capacity of Congress to Control the Future, 13 Hastings Const. L. Q. 185 (1986). I do not mean to take a position on that question. The point is that under the Act the implementing authorities have no power to designate which cuts will be made.

If Congress does decide to give the President or his subordinates authority to implement the Act, it might be useful to adopt various strategies to minimize the risk of mistaken or improperly motivated decisions by the executive branch. I set out some possibilities here.

First, Congress should repeal section 274(h) of the Act. That provision states that the "economic data, assumptions, and methodologies used by the Comptroller General in computing the base levels of total revenues and total budget outlays . . . shall not be subject to review in any judicial or administrative proceeding." The decisions of the executive branch are usually reviewable under the standards set out in the Administrative Procedure Act, which requires courts to ensure that agency action is consistent with law and is not "arbitrary, capricious, or an abuse of discretion." There is no sufficient reason to make a special exception here. The standards of judicial review are deferential, and reasonable OMB determinations will be upheld; and the existence of review is a useful safeguard. Perhaps the problem appeared a bit different when the calculations were to be made by the Comptroller General, an arm of Congress. But if the President or OMB is to make the decision, there should be judicial review under the ordinary standards.

Second, Congress might require consultation between the relevant OMB officials and officials at the General Accounting Office and the Congressional Budget Office. A report from the GAO and the CBO might be made a necessary part of executive branch deliberations. Indeed, OMB might be required to explain any deviations between its decisions and those of its various advisers. This route would not raise any legal problem, but it might at the same time discipline the processes of decision by the executive branch, and expose it to public and congressional scrutiny--especially if OMB should prove to have been wrong.

All in all, the best option seems to be (a) to vest the powers now placed in the Comptroller General in the President or his subordinates and (b) to amend the Act so as to limit executive discretion. The alternative routes, most of which involve changing the legal status of the Comptroller General, might have some advantages, but the disadvantages are substantial.

B. Eliminate Congress' power to remove the Comptroller General. This alternative is quite simple, and it would be a straightforward response to the Bowsher decision. And this option would be approved by those who seek political independence in the determinations made under the Act. But it suffers from several problems.

First, it is unclear what the effect of such a decision would be. Ordinarily congressional silence on the subject of removal is understood to mean that the President has plenary power to remove. If the section granting removal power to

Congress were deleted, the Comptroller General might become an "at-will" employee of the President--and that is presumably not what Congress intends.

Second, it might not be desirable to immunize the Comnptroller General from removal by Congress. It is generally appropriate to ensure that public officials are controlled by the legislative or executive branches. An official who is not subject to dismissal by either is not consistent with constitutional traditions. Moreover, Congress has traditionally sought to make the Comptroller General its agent, and elimination of the removal authority would undermine that goal.

Finally, and perhaps most important, this strategy would not necessarily resolve the constitutional problem. The Department of Justice argued in the Bowsher case that Congress could not confer the authority in the Act on an official not subject to presidential control. This argument has considerable force. To be sure, the Court's decision in Humphrey's Executor, supra, recognizes congressional power to create administrative agencies whose heads are not subject to "at will" dismissal by the President. But in at least two respects, the case under consideration would be different from Humphrey's Executor.

First, the functions to be performed by the Federal Trade Commission included "quasi-legislative" and "quasi-adjudicative" duties. The responsibilities to be carried out under the Act are--the Supreme Court said in the Bowsher case--executive in nature.[2] Second, the officials in Humphrey's Executor were at least subject to presidential removal "for inefficiency, neglect of duty, or malfeasance of office." In Bowsher--in thus far ignored but potentially crucial language--the Court interpreted these terms to be "very broad" and said that they "could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will." Under this interpretation, the statute in Humphrey's Executor allowed the President to retain considerable control over the officers of "independent" agencies. Thus it is unclear whether the strategy under discussion, allowing no presidential control, would be acceptable.

Even if these difficulties could be surmounted, there is a possibility that the Court will doubt the continuing validity of the reasoning or even the result in Humphrey's Executor. There remain in addition the concerns expressed by the Department of Justice and Justices Stevens and Marshall in Bowsher. The Department of Justice argued that the President could not be subject to enforceable commands from subordinate officials. And Justice Stevens suggested that because the Comptroller General is an agent of the legislature, his conduct must be in accordance with the constitutionally specified procedures for congressional action. It is not clear if the strategy under discussion would answer this objection.

C. Allow presidential removal of the Comptroller General, but only for "extraordinary improprieties." This course of action

---

[2] It would be possible to respond, however, that one should look at the totality of the Comptroller General's duties, and some of those are "quasi-legislative" and "quasi-adjudicative" as those terms were used in Humphrey's Executor.

would be modelled on the standard set out to govern discharge of Special Prosecutor Archibald Cox during the Watergate crisis. To make the comptroller general removable by the President only for "extraordinary improprieties" would have what some might see as several advantages. First, it would immunize the Comptroller General from close presidential control. This standard for dismissal is quite stringent, and the President would not have much authority over the activities of the Comptroller General. Such a standard would be more likely to be upheld against constitutional attack than the immediately preceding option, for it would allow some presidential control.

But there are problems here as well. Such a decision might not avoid the constitutional problem in light of the executive functions performed by the Comptroller General under the Act. The objections of the Department of Justice remain. Moreover, it is, for reasons set out above, unclear that the functions at issue should be performed by an official independent of the president.

D. Allow presidential removal of the Comptroller General under ordinary "independent agency" standards. Another alternative would be to allow the President to remove the comptroller general under the ordinary standards applied to independent agencies: "inefficiency, neglect of duty, and malfeasance." This approach would allow more presidential control than either of the two immediately preceding options, and to that extent would increase the changes of constitutionality and might well be more desirable on policy grounds. On the other hand, it would not definitively resolve the constitutional question. The objection raised by the Department of Justice would remain: the functions performed under the Act may be such as to require plenary presidential removal power. Moreover, it is not clear that Congress does and should want to place the Comptroller General under the general control of the President. This approach would apply quite generally to all of the functions of the comptroller general; and such a result would be inconsistent with traditional conceptions about the Comptroller General's role.

D. Place the Comptroller General in the executive branch. Perhaps the most dramatic response to Bowsher would be to place the Comptroller-General in the executive branch, as an employee subject to "at will" dismissal by the President. The advantages of this approach are that it would simultaneously (1) resolve the constitutional problems raised by the Act, subject to the nondelegation concerns discussed above, (2) lay to rest the constitutional questions about the various activities of the comptroller general, questions that, as discussed below, may be answered unfavorably to the current law, and (3) place authority that is at least in part executive in the hands of the President. The problem raised by this approach is that it is a blunderbuss answer to a fairly narrow problem--that raised by the Act. It may be a mistake to institute dramatic changes in the nature of the Comptroller General when there is no immediate need to do so in order to rescue the Act from constitutional attack. Moreover, there are some good reasons that Congress has sought to make the Comptroller-General independent from the executive branch. In these circumstances, such a dramatic change should probably be avoided.

III. "Independent Agencies," the Comptroller General, and Bowsher: Some General Thoughts

The Bowsher decision provides a useful occasion for rethinking the question of "independent" agencies and the respective roles of the President and Congress in the process of regulation and appropriations. That issue is of special current importance. The problem of "independent" agencies is raised in a number of pending cases, involving the prosecutorial functions of the Federal Trade Commission, the open market committee of the Federal Reserve Board, and other powers of the Comptroller General. This is a large and difficult subject, and it will be possible only to touch the surface in this statement. Nonetheless, it may be useful to set out some brief and general remarks.

The opinion of the district court in Bowsher rightly points out that "independent" agencies were created in a time of belief in neutral experts, who would decide public policy in an impartial fashion. But the belief in the impartial use of expertise has declined in the past two decades. Regulatory questions involve value judgments, not science. In these circumstances "independence" carries significant risks.[3]

---

[3] In particular, the risks are two-fold. "Independent" agencies may in practice be subject to the influence of well-organized private groups. Moreover, their members may have agendas of their own, and the lack of political accountability makes it especially (note cont. next pg.)

"Independent" agencies are also sometimes approved on the alternative ground that they are agencies of Congress in a distinctive sense, matching agencies of the President and ensuring a measure of equality between the two branches. But this view ignores the fact all agencies are in an important sense "of Congress." They are created by Congress; they are subject to the legal requirements laid down by Congress; they are controlled by the appropriations process; they must face all kinds of informal legislative checks. The central point is this: To immunize an agency from presidential control is neither necessary nor sufficient to make it subject to legislative supervision.

These considerations do not necessarily suggest that Humphrey's Executor will or should be overruled. Where Congress has deliberately decided to immunize an official from presidential power, there is some reason to respect its decision, especially in light of the necessary and proper clause. Moreover, the rise of the administrative state has made courts unwilling always to adhere to original understandings about the separation of powers--notwithstanding the recent decisions. Finally, stare decisis has a powerful claim, especially in a context in which institutional arrangements and expectations have been developed around the decision in Humphrey's Executor.

These considerations furnish plausible arguments in favor of accepting the holding if not the reasoning in Humphrey's Executor. But it is nonetheless true that "independent" agencies are something of an anomaly in the constitutional structure, that

---

likely that they will attempt to implement those agendas.

clear lawmaking is the ordinary method by which Congress makes its will known, and that in the exercise of their constitutional responsibilities, members of Congress as well as courts should have at least a presumption of skepticism toward the idea of "independent" execution of the laws.

I now turn to a more specific issue: the status of the Comptroller General in the wake of Bowsher. In Ameron, Inc. v. U.S. Army Corps of Engineers, 787 F.2d 875 (3d Cir. 1986), the court was confronted with a challenge to the exercise of authority by the Comptroller General under the Competition in Contracting Act (CICA). The CICA grants the Comptroller General a wide range of powers, including some best characterized as executive and adjudicative. The court upheld the CICA, reasoning that the Comptroller General is part of a "fourth branch" and exercises both executive and legislative responsibilities. But the reasoning in Ameron is in severe tension with that in Bowsher. Bowsher does not rely on notion of a "fourth branch"; it requires an examination of the functions performed by the Comptroller General. If those functions are executive, the current arrangement is to that degree unconstitutional.[4] There can be no doubt that many of the current duties of the Comptroller General are executive--quite apart from the questions involved in the administration of the balanced budget and deficit measures.

These considerations suggest that Congress should consider alterations in current law in order to avoid invalidation.[5] At least two alternative routes are possible. The first would be to adopt some strategy, akin to those discussed above, to remove congressional power over the Comptroller General and/or to increase presidential control. Some such strategy would resolve the constitutional problem, or at least make it less likely to be resolved unfavorably. In this regard, it is important to keep in mind the fact that the likelihood of validation will increase as congressional removal power is limited and presidential power increased.

---

[4] The legal status of the Comptroller General is unclear insofar as he performs adjudicative responsibilities.

A second strategy, in some ways more appealing, would be to split up the functions now performed by the Comptroller General into various entities. This strategy could be adopted in conjunction with the first. The "quasi-legislative" functions might be retained in an entity like the current Comptroller General. The executive functions might then be placed in an agency that is currently within the executive branch, or in a new agency that would be subject to some or plenary presidential control. The adjudicative functions might be placed in a third entity or perhaps retained. This strategy would have the advantage of retaining a large part of the current role of the Comptroller General, as an agent of the Congress--and that role is of special importance insofar as his functions are genuinely those of a legislative assistant.

---

[5] But see note 2 supra, suggesting a possible means of upholding an "independent" Comptroller General.

IV. Conclusion

If Congress wants to retain the essentials of the current framework in the Act, the best response to the Bowsher case would be to transfer the authority now vested in the Comptroller General and to place it in the hands of the President or his subordinates--probably OMB. This strategy would reduce the likelihood of a successful constitutional attack; it would also put the implementation of the Act in accountable officials. At the same time, Congress might take various measures to confine executive discretion and to ensure executive adherence to the law. Some possible measures include provision for judicial review, participation--albeit advisory--by the Comptroller General in the process, and opportunities for legislative override of OMB determinations.

Bowsher does not by any means spell the end of "independent" agencies or even of the current status of the Comptroller General. But it does suggest that Congress might reconsider the modern responsibilities of the Comptroller General, at least insofar as they are executive in character. After Bowsher, executive functions should probably be placed in some other institution. In my view, there are no serious dangers in such a course. All agencies, whether "independent" or not, are ultimately required to enforce the law as set out by Congress. Agencies subject to presidential supervision are not, by virtue of the fact, free to ignore the statutory limits that Congress has imposed on their authority.

GRAMM-RUDMAN II OPTION

United States Senate
WASHINGTON, D.C. 20510

July 22, 1986

Dear Colleague,

Congress made a commitment to fiscal responsibility and to reduce the federal deficit last December when it enacted the Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings). Two weeks ago the Supreme Court praised Congress's efforts to solve the problem of mounting deficits and upheld the basic structure of the Act, while finding the selection of the Comptroller General to perform certain reporting functions in the sequester process to be unconstitutional. In response to the Supreme Court decision, we will reconstitute Gramm-Rudman-Hollings in an amendment to the Debt Limit Extension bill.

Under the original Act, OMB and CBO issue a joint report to the Comptroller General which estimates the size of the deficit. The Comptroller General reviews this report and issues a report to the President, who then issues the sequester order based upon the Comptroller General's certification. This last step was held to be unconstitutional because the report requiring the Presidential order should come from a member of the executive branch, and the Supreme Court has determined that the Comptroller General is an agent of Congress. Our proposal will remedy this objection by simply including one additional step: the Comptroller General will submit his report to the Director of OMB, an officer of the executive branch, who will then issue the report for the President's sequester order. The same stringent restraints and criteria previously applicable to the Comptroller General would now apply to the Director of OMB.

This minor change--allowing the President's order to be based on OMB's "green eyeshade" report--will keep the teeth in Gramm-Rudman-Hollings and keep Congress's feet to the fire. Congress has already demonstrated its willingness to comply with Gramm-Rudman-Hollings by affirming the 1986 sequester order issued on March 1. By supporting this measure, we demonstrate our continued commitment to reduce the deficit and eliminate any uncertainty about the fact that we mean business in reducing the deficit.

Attached is a copy of the sequester process timetable under the proposed revision. We plan to offer "The Balanced Budget and Emergency Deficit Control Reaffirmation Act" (Gramm-Rudman-Hollings II) as an amendment to the Debt Limit Extension bill later this week and would be honored to have you join us as an original co-sponsor. If you have any questions, please have your staff call Margaret Davis (x44535), Tom Polgar (x41602), or Bob Sneed (x49351).

Yours respectfully,

Phil Gramm Fritz Hollings Warren B. Rudman

PHIL GRAMM ERNEST HOLLINGS WARREN RUDMAN

REVISED SEQUESTER PROCESS TIMETABLE

as proposed by Senators Gramm, Rudman and Hollings

Date	Action
August 15	The "snapshot" of the deficit is taken.
August 20	OMB and CBO report to GAO.
August 25	GAO audits findings and reports to the Director of OMB.
September 1	The Director of OMB issues the report to the President and Congress, based on GAO findings, and fully explains any differences between the two reports.
September 3	The Presidential Order is issued based on the OMB report.
Month of September	Congress has an opportunity to act to eliminate the excess deficit.
October 1	The order takes effect unless Congress has acted to eliminate the excess deficit.
October 5	OMB and CBO issue a revised report to reflect final Congressional action.
October 10	GAO issues a revised report to the Director of OMB.
October 15	The Director of OMB issues a revised report to the President and Congress.
October 17	The final order, based on the revised report, is effective unless deficit overage has been eliminated.
November 15	GAO compliance report is issued.

Under this revised timetable, the month of September would still be set aside for a Congressional response to the sequestration order. All actions and dates above are the same as in the original timetable, except that the GAO now issues its report to the Director of OMB, OMB issues a report to the President on September 1 and October 15, and the Presidential Order is now based on the Director of OMB's report. The dates of the Presidential Orders are also delayed by two days (to September 3 and October 17).

159920.417 S.L.C.

99th CONGRESS
2d Session S. ______

IN THE SENATE OF THE UNITED STATES

Mr. Gramm (for himself, Mr. Rudman, and Mr. Hollings) introduced the following bill; which was read twice and referred to the Committee on ____________________

A BILL

To modify the procedures set forth in part C of the Balanced Budget and Emergency Deficit Control Act of 1985.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the ''Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1986''.

SEC. 2. REVISION OF PROCEDURES.

(a) Reference.--Except as otherwise specifically provided, whenever in this section an amendment is expressed in terms of an amendment to a section or other provision, the reference shall be considered to be a reference to a section or other provision of the Balanced Budget and Emergency Deficit Control Act of 1985.

(b) Revision of Reporting Responsibilities.--(1) Section 251(b) is amended--

(A) by striking out ''President'' in paragraph (1) and inserting in lieu thereof ''Director of the Office of Management and Budget'';

(B) by redesignating subparagraphs (A) and (B) of paragraph (2) as clauses (i) and (ii), respectively;

(C) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively;

(D) by striking out ''this subsection'' in subparagraph (B) (as redesignated by subparagraph (C) of this paragraph) and inserting in lieu thereof ''this paragraph'';

(E) by by striking out the subsection heading and inserting in lieu thereof the following:

''(b) Reports by the Comptroller General and Director of OMB.--

''(1) Report to the Director of OMB and the Congress by the Comptroller General.--''; and

(F) by adding at the end thereof the following:

''(2) Report to President and Congress by the Director of OMB.--

''(A) Report to be based on GAO report.--The Director of the Office of Management and Budget shall review and consider the report issued by the

Comptroller General under paragraph (1) of this subsection for the fiscal year and, with due regard for the data, assumptions, and methodologies used in reaching the conclusions set forth therein, shall issue a report to the President and the Congress on September 1 of the calendar year in which such fiscal year begins, estimating the budget base levels of total revenues and total budget outlays for such fiscal year, identifying the amount of any deficit excess for such fiscal year, stating whether such deficit excess will be greater than $10,000,000,000 (zero in the case of fiscal year 1991), specifying the estimated rate of real economic growth for such fiscal year, for each quarter of such fiscal year, and for each of the last two quarters of the preceding fiscal year, indicating whether the estimate includes two or more consecutive quarters of negative economic growth, and specifying (if the excess is greater than $10,000,000,000, or zero in the case of fiscal year 1991), by account, for non-defense programs, and by account and programs, projects, and activities within each account, for defense programs, the base from which reductions are taken and the amounts and percentages by which such accounts must be reduced during such fiscal year in order to eliminate such deficit excess. Such report shall be based on the estimates, determinations, and specifications of the Comptroller General under paragraph (1) and shall utilize the budget base, criteria, and guidelines set forth in subsection (a)(6) and in sections 255, 256, and 257.

''(5) Contents of report.--The report of the Director of the Office of Management and Budget under this paragraph shall--

''(i) provide for the determination of reductions in the manner specified in subsection (a)(3); and

''(ii) contain estimates, determinations, and specifications for all of the items contained in the report submitted by the Comptroller General under paragraph (1).

The report of the Director of the Office of Management and Budget under this paragraph shall explain fully any differences between the contents of such report and the report of the Comptroller General under paragraph (1).''.

(2) Section 251(c) is amended--

(A) by striking out ''President'' in subparagraph (A) of paragraph (2) and inserting in lieu thereof ''Director of the Office of Management and Budget'';

(B) by striking out ''subsection (b)'' each place it appears in such paragraph and inserting in lieu thereof ''subsection (b)(1)'';

(C) by striking out ''subsection (b)(2)(B)'' in subparagraph (B) of such paragraph and inserting in lieu thereof ''subsection (b)(1)(B)(ii)''; and

(D) by adding at the end thereof the following new paragraph:

''(3) Report by the Director of OMB.--

''(A) On October 15 of the fiscal year, the Director of the Office of Management and Budget shall submit to the President and the Congress a report revising the report submitted by the Director of the Office of Management and Budget under subsection (b)(2), adjusting the estimates, determinations, and specifications contained in that report to the extent necessary in the light of the revised report submitted to the Director of the Office of Management and Budget by the Comptroller General under paragraph (2) of this subsection.

''(B) The revised report of the Director of the Office of Management and Budget under this paragraph shall provide for the determination of reductions as specified in subsection (a)(3) and shall contain all of the estimates, determinations, and specifications required (in the case of the report submitted under subsection (b)(2)) pursuant to subsection (b)(2)(B)(ii).''.

(3)(A) Section 251(e) is amended by striking out ''Directors or the Comptroller General'' and inserting in lieu thereof ''Directors, the Comptroller General, or the Director of the Office of Management and Budget''.

(B) Section 251(f) is amended by striking out ''subsections (b) and (c)(2)'' and inserting in lieu thereof ''subsections (b)(1) and (c)(2), and the reports of the Director of the Office of Management and Budget submitted to the Congress under subsections (b)(2) and (c)(3),''.

(c) Presidential Orders.--(1) Section 252(a) is amended--

(A) by striking out ''Comptroller General'' the first place it appears in paragraph (1) and inserting in lieu thereof ''Director of the Office of Management and Budget'';

(B) by striking out ''section 251(b)'' each place it appears in paragraphs (1) and (3) and inserting in lieu thereof ''section 251(b)(2)'';

(C) by striking out ''September 1'' in paragraph (1) and inserting in lieu thereof ''September 3''; and

(D) by striking out ''Comptroller General's'' in the heading for paragraph (3) and inserting in lieu thereof ''Director's''.

(2) Section 252(b) is amended--

(A) by striking out ''Comptroller General'' each place it appears and inserting in lieu thereof ''Director of the Office of Management and Budget'';

(B) by striking out ''section 251(b)'' each place it appears and inserting in lieu thereof ''section 251(b)(2)'';

(C) by striking out ''section 251(c)(2)'' each place it appears and inserting in lieu thereof ''section 251(c)(3)''; and

(D) by striking out ''October 15'' in paragraph (1) and inserting in lieu thereof ''October 17''.

(d) Termination or Modification Procedures.--(1) Section 251(d) is amended by striking out paragraph (3).

(2) The last sentence of section 251(c)(1) is amended by striking out ''and authorized under subsection (d)(3)(D)(i)''.

(3) Section 256(i)(2) is amended by striking out '', in accordance with section 251(d)(3),''.

(e) Technical Amendments.--(1) Section 254(b)(1)(A) is amended by striking out ''Comptroller General under section 251(c)(2)'' and inserting in lieu thereof ''Director of the Office of Management and Budget under section 251(c)(3)''.

(2) Section 274(f)(5) is amended by striking out ''section 251(b) or (c)(2)'' and inserting in lieu thereof

''section 251(b)(2) or (c)(3)''.

(3) Section 274(h) is amended--

(A) by striking out ''Comptroller General'' the first place it appears and inserting in lieu thereof ''Director of the Office of Management and Budget''; and

(B) by striking out ''Comptroller General under section 251(b) or (c)(2)'' and inserting in lieu thereof ''Director of the Office of Management and Budget under section 251(b)(2) or (c)(3)''.

(f) Applicability.--The amendments made by this section shall apply with respect to any report required to be submitted, and any order issued, after the date of enactment of this Act under part C of the Balanced Budget and Emergency Deficit Control Act of 1985.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPRESENTATIVE MIKE SYNAR, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant,

UNITED STATES SENATE,
SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF
THE UNITED STATES HOUSE OF REPRESENTATIVES,
COMPTROLLER GENERAL OF THE UNITED STATES,

Intervenors.

Civil Action No. 85-3945

FILED
FEB 7 1986
JAMES E. DAVEY, Clerk

NATIONAL TREASURY EMPLOYEES UNION,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant,

UNITED STATES SENATE,
SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF
THE UNITED STATES HOUSE OF REPRESENTATIVES,
COMPTROLLER GENERAL OF THE UNITED STATES,

Intervenors.

Civil Action No. 85-4106

ORDER

Upon consideration of the pending dispositive motions filed by the parties in the above actions, the memoranda of points and authorities in support thereof and in opposition thereto, and the entire record herein, and all parties having been heard in open court thereon, and for the reasons stated in the accompanying opinion, it is by the court this 7th day of February, 1986,

ORDERED that the automatic deficit reduction process established by the Balanced Budget and Emergency Deficit Control Act of 1985, under which the President is required to issue a sequestration order implementing the budget reduction specifications of a report prepared by the Comptroller General, be, and hereby is, declared unconstitutional on the ground that it vests executive power in the Comptroller General, an officer removable by Congress; and it is further

ORDERED that the presidential sequestration order issued on February 1, 1986 pursuant to the unconstitutional automatic deficit reduction process be, and hereby is, declared without legal force and effect; and it is further

ORDERED that such action is without prejudice to implementation of the alternate deficit reduction process specifically set forth in section 274(f) of the Act to cover the eventuality of the invalidation declared above;

ORDERED, pursuant to subsection 274(e) of the Act, that the effect of this judgment be, and hereby is, stayed during the pendency of any appeal taken under subsection 274(b) of the Act.

Antonin Scalia

Antonin Scalia, Circuit Judge of
the United States Court of Appeals
for the District of Columbia
Circuit

Norma Holloway Johnson

Norma Holloway Johnson, District
Judge of the United States District
Court for the District of Columbia

Oliver Gasch

Oliver Gasch, Senior District Judge
of the United States District Court
for the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPRESENTATIVE MIKE SYNAR, et al.,
Plaintiffs,
v.
UNITED STATES OF AMERICA,
Defendant,
UNITED STATES SENATE,
SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
COMPTROLLER GENERAL OF THE UNITED STATES,
Intervenors.

Civil Action No. 85-3945

FILED
FEB 7 1986
JAMES E. DAVEY, Clerk

NATIONAL TREASURY EMPLOYEES UNION,
Plaintiff,
v.
UNITED STATES OF AMERICA,
Defendant,
UNITED STATES SENATE,
SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
COMPTROLLER GENERAL OF THE UNITED STATES,
Intervenors.

Civil Action No. 85-4106

Alan B. Morrison, with whom Katherine A. Meyer was on the brief, for plaintiffs in No. 85-3945.

Lois G. Williams, with whom Gregory O'Duden and Richard S. Edelman were on the brief, for plaintiff in No. 85-4106.

Richard K. Willard, Assistant Attorney General, with whom Joseph E. diGenova, United States Attorney, David J. Anderson, Branch Director, United States Department of Justice, Neil H. Koslowe, Special Litigation Counsel, United States Department of Justice, and Douglas Letter, Harold J. Krent, Robert E. Kopp, Leonard Schaitman, Judith Ledbetter, Lee Sarah Liberman, Lori Fields and Richard Greenberg, Attorneys, United States Department of Justice, were on the brief, for defendant United States of America.

Michael Davidson, Counsel, United States Senate, with whom Ken U. Benjamin, Deputy Counsel, United States Senate, and Morgan J. Frankel and John C. Grabow, Assistant Counsel, United States Senate, were on the brief, for intervenor-defendant United States Senate.

Steven R. Ross, General Counsel to the Clerk of the United States House of Representatives, with whom Charles Tiefer, Deputy General Counsel to the Clerk of the United ~~States~~ House of Representatives, and Michael L. Murray, Assistant Counsel to the Clerk of the United States House of Representatives, were on the brief, for intervenor-defendant Speaker and Bipartisan Leadership Group of the United States House of Representatives.

Lloyd N. Cutler, with whom Harry R. Van Cleve, General Counsel, United States General Accounting Office, James F. Hinchman, Deputy General Counsel, United States General Accounting Office, Robert P. Murphy, Attorney-Advisor, United States General Accounting Office, John H. Pickering, William T. Lake, Michael S. Helfer, Daniel M. Drory and Richard K. Lahne were on the brief, for intervenor-defendant Comptroller General of the United States.

Before SCALIA, Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit, JOHNSON, District Judge of the United States District Court for the District of Columbia, and GASCH, Senior District Judge of the United States District Court for the District of Columbia.

PER CURIAM:

Plaintiffs in these consolidated cases challenge the constitutionality of certain features of the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037, popularly known as the Gramm-Rudman-Hollings Act, signed into law by President Reagan on December 12, 1985. The principal issues presented are whether the plaintiffs, Members of Congress and the National Treasury Employees Union, have standing to litigate the points they raise; whether the Act unconstitutionally delegates legislative powers that may be exercised only by Congress; and, if not, whether it confers upon the Comptroller General executive powers that may not constitutionally be given to an officer removable by Congress. We find that plaintiffs in both cases have standing, and that the powers in question may lawfully be delegated, but that the delegation to the Comptroller General violates the constitutionally requisite separation of powers.

I

In the Act, Congress has set a "maximum deficit amount" for each of the fiscal years 1986 through 1991, its size progressively reducing to zero in fiscal year 1991. Section 251 provides that each year the Directors of the Office of Management and Budget ("OMB") and the Congressional Budget Office ("CBO") shall estimate the amount of the deficit for the upcoming fiscal year, and, if it exceeds the maximum deficit amount for that fiscal year by more than a specified amount, shall calculate, program by program pursuant to rules specified in the Act, the budget reductions necessary to ensure that the deficit does not exceed the maximum deficit amount for that year. The Directors must jointly report their deficit estimates and budget reduction calculations to the Comptroller General. After reviewing the Directors' report, the Comptroller General must issue his own report, containing his deficit estimates and budget reduction calculations, to the President and Congress. Section 252 of the Act requires the President to issue a "sequestration" order containing the budget reductions specified by the Comptroller General. After a prescribed time, the sequestration order becomes effective and the spending reductions included in that order are automatically made. The automatic deficit reduction process for fiscal year 1986 has progressed to the point of issuance, on February 1, 1986, of the presidential sequestration order, which will take effect on March 1, 1986. See Order, Emergency Deficit Control Measures for Fiscal Year 1986 (Feb. 1, 1986).

The Act also provides what might be called a "fallback" deficit reduction process, to take effect if any of the reporting procedures of the above-described "automatic" deficit reduction process are found unconstitutional. Under the fallback process, the report prepared by the Directors of the OMB and the CBO is submitted, instead of to the Comptroller General, to a special joint committee of Congress, which must in five days report to both Houses a joint resolution setting forth the contents of the Directors' report. The joint resolution is then considered under special rules, and, if passed and signed by the President, serves as the basis for the presidential sequestration order under section 252.

Civil Action No. 85-3945, seeking declaratory relief against the United States, was commenced on December 12, 1985 by Mike Synar, a Member of the House of Representatives who voted against the Act. An amended complaint, filed on December 19, 1985, added as plaintiffs eleven other Representatives who voted against the Act. Jurisdiction is averred to exist pursuant to subsection 274(a)(1) of the Act, which authorizes any Member of Congress to bring an action in this court "for declaratory and injunctive relief on the ground that any [presidential] order that might be issued pursuant to section 252 violates the Constitution."[1]

The complaint alleges that the automatic deficit reduction process, under which the President is required by section 252 to issue a sequestration order implementing the report issued by the Comptroller General pursuant to section 251, is unconstitutional in two respects. Plaintiffs' first contention, briefly and essentially, is that the delegation of power by Congress to the President and other government officials is an unconstitutional delegation of legislative power. Their second contention is that the powers assigned to the Comptroller General and the Director of the CBO, both deemed legislative branch officials by plaintiffs, constitutionally must be assigned to executive branch officials. The Representatives allege that these unconstitutional provisions injure them by (1) interfering with their constitutional duties to enact laws regarding federal spending; (2) causing automatic reductions in their salaries, staff salaries, and office expenses; and (3) causing automatic reductions in a variety of programs benefiting their constituents. They seek a judgment declaring that the automatic deficit reduction process is unconstitutional and that the President is without power, therefore, to order spending reductions pursuant to that process.

In response to the Synar complaint, the United States filed a motion to dismiss on the ground that the congressional plaintiffs lack standing to bring the action. The United States Senate and the Comptroller General moved for leave to intervene as defendants and also filed motions to dismiss on the ground that the Act is constitutional. The unopposed motions to intervene were granted on December 31, 1985.

Civil Action No. 85-4106, challenging the constitutionality of the automatic deficit reduction process on legal theories identical to those presented in the Synar action, was filed on December 31, 1985 by the National Treasury Employees Union ("NTEU"). NTEU, an unincorporated association representing the interests of both active and retired federal employees, alleges that its retired members have been injured as a result of the Act's automatic spending reduction provisions, which have operated to suspend cost-of-living adjustments ("COLAs") otherwise due federal retirees on January 1, 1986, and which will operate to cancel those COLAs and other COLAs due in the future. NTEU invokes the court's jurisdiction pursuant to 28 U.S.C. § 1331 and to subsection 274(a)(2) of the Act, which provides, in pertinent part, that "any other person adversely affected by an action taken under this title, may bring an action [in this court] for declaratory judgment and injunctive relief concerning the constitutionality of this title." By Order dated January 2, 1986, the NTEU suit was consolidated with the earlier action.

---

[1] Subsection 274(a)(5) provides that any such action "shall be heard and determined by a three-judge court in accordance with [28 U.S.C. § 2284]." A designation of judges to serve as the three-judge district court in this case was made by the Chief Judge for the District of Columbia Circuit on December 16, 1985.

Subsequent to consolidation, the congressional plaintiffs and NTEU filed their respective motions for summary judgment on January 6, 1986. The congressional plaintiffs also filed an opposition to the motion of the United States to dismiss their complaint for lack of standing. Thereafter, on January 8, 1986, the Speaker and Bipartisan Leadership Group of the United States House of Representatives, granted leave to intervene as a defendant in the consolidated cases, filed a memorandum of law in support of the constitutionality of the Act.

The United States filed a cross-motion for summary judgment, again contending that the complaint of the congressional plaintiffs must be dismissed for lack of standing but conceding that NTEU appears to have standing. On the merits, the position of the United States is that the Act does not unconstitutionally delegate legislative authority but that the role of the Comptroller General in the automatic deficit reduction process violates the principle of separation of powers.[2]

---

[2] The United States has also requested us to declare that the fallback deficit reduction process contained in § 274 of the Act is constitutional. Although we see no reason to (cont'd)

The motions of plaintiffs for summary judgment, as well as the cross-motion of the United States for summary judgment on the merits, are opposed by the Senate, the Comptroller General, and the Speaker and Bipartisan Leadership Group of the United States House of Representatives. Argument on these dispositive motions was heard on January 10, 1986, and the cases taken under advisement. By Order dated January 23, 1986, the Senate and the Comptroller General were granted leave to intervene in the NTEU action.

II

In view of the established rule that "consolidation . . . does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another," Johnson v. Manhattan Railway, 289 U.S. 479, 496-97 (1933); see also McKenzie v. United States, 678 F.2d 571, 574 (5th Cir. 1982), we find it necessary to make separate standing determinations with respect to the plaintiffs in each case under consideration. Moreover, even though the standing of NTEU has not been directly challenged, we must satisfy ourselves that NTEU has standing before we can proceed to consider its claims. Article III circumscribes the power of federal courts, and "[t]hose who do not possess Art. III standing may not litigate as suitors in the courts of the United States." Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 475-76 (1982). Before turning to a particularized analysis of whether NTEU and the congressional plaintiffs have made the necessary showing for standing in their respective cases, a brief general discussion of the applicable principles is appropriate.

While the plaintiffs invoke this court's jurisdiction under the judicial review provisions contained in section 274 of the Act, they concede, as they must, that Congress

---

doubt that proposition, the issue simply is not before this court. The plaintiffs have conceded the constitutionality of the fallback process, and the United States — the nominal defendant — has not set forth any claim for relief in its own behalf.

may not abrogate the constitutional limitations imposed by Article III upon the power of the federal courts. See Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979); Muskrat v. United States, 219 U.S. 346 (1911). Article III limits the jurisdiction of federal courts to "cases or controversies," and "whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III .... is the threshold question in every federal case." Warth v. Seldin, 422 U.S. 490, 498 (1975). Principles of standing ensure that one who invokes the power of a federal court satisfies this "case or controversy" requirement.

Although the Supreme Court has noted that "the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it," Valley Forge Christian College, 454 U.S. at 475, the Court has repeatedly recognized that the concept entails certain basic requirements. The first and most fundamental of these is that a party must allege a "distinct and palpable injury to himself." Warth v. Seldin, 422 U.S. at 501. This injury must be a "particular concrete injury," United States v. Richardson, 418 U.S. 166, 177 (1974), which must amount to "a claim of specific present objective harm or a threat of specific future harm." Laird v. Tatum, 408 U.S. 1, 14 (1972). A plaintiff need not await the consummation of a threatened injury in order to have standing; it is sufficient that the injury is imminent. Babbitt v. United Farm Workers National Union, 442 U.S. 289, 298 (1979). The further requirements of Article III standing are set forth in the Supreme Court's recent formulation that "at an irreducible minimum, Art. III requires the party who invokes the court's authority to [show] . . . that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.' " Valley Forge Christian College, 454 U.S. at 472 (quoting Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38, 41 (1976)); see also Allen v. Wright, 104 S. Ct. 3315 (1984).

Thus, at a minimum, Article III requires NTEU and the congressional plaintiffs to show (1) actual or threatened injury, (2) traceable to the defendant, and (3) amenable to judicial remedy.[3] In analyzing whether they have done so, we must accept as true all material allegations of the complaints and construe them in favor of the complaining parties. Warth v. Seldin, 422 U.S. at 501. We therefore assume, for the limited purpose of the following standing analysis, that the automatic deficit reduction process challenged by plaintiffs is unconstitutional.

A

NTEU contends that it has standing to bring this action because subsection 252(a)(6)(C)(i) of the Act, as part of the automatic deficit reduction process, has operated to suspend payment of annual COLA benefits otherwise due those of its members who are federal retirees. NTEU also complains that, effective March 1, 1986, the presidential sequestration order issued on February 1, 1986 will permanently cancel retirees' COLA benefits for this fiscal year.[4] It claims that these actual and threatened injuries have been and will be caused by the automatic deficit reduction process and would be redressed if that process were declared unconstitutional.

---

[3] In the ordinary case, other limitations on standing exist — so-called "prudential" limitations, not strictly required by Article III. One of these that might normally have some effect in the present case is the requirement that the plaintiff be arguably within the "zone of interests" intended to be protected by the statutory or constitutional provision on which he relies. See, e.g., Valley Forge Christian College, 454 U.S. at 475. We disregard these prudential limitations because we think it clear that Congress has, by enacting the judicial review provisions contained in § 274, expanded standing to challenge the constitutionality of the Act to the full extent permitted by Article III. Cf. Gladstone, Realtors v. Village of Bellwood, 441 U.S. at 100.

[4] Subsection 252(a)(6)(C)(i) provides, in pertinent part:

> Notwithstanding any other provision of law, any automatic spending increase that would (but for this clause) be . . . paid [between the enactment of the Act and the effective date of a sequestration order for fiscal year 1986] shall be suspended until such order becomes effective, and the amounts that would otherwise be expended during such period with respect to such increases shall be withheld. If such order provides that automatic spending increases shall be reduced to zero during [fiscal year 1986], the increases suspended pursuant to the preceding sentence and any legal rights thereto shall be permanently cancelled.

It is well established that an association such as NTEU has standing to sue solely as the representative of its members, provided that they individually would have standing. *Warth v. Seldin*, 422 U.S. at 511. There is no question that NTEU's federal retiree members have suffered actual injury by the suspension of their COLA benefits pursuant to the Act, and that they will suffer further injury by the permanent cancellation of those benefits on March 1, 1986, under the terms of the President's February 1 sequestration order. *See Order, Emergency Deficit Control Measures for Fiscal Year 1986* 1, 4 (Feb. 1, 1986). We conclude that NTEU has made a sufficient showing of injury to satisfy Article III's threshold requirement of injury-in-fact.

We must also consider the question of redressability, *i.e.*, whether it is likely that the relief requested will redress the injury complained of, before a finding of standing can be made. As to at least the second of the injuries of which NTEU complains — the imminent permanent cancellation of its members' COLA benefits by the operation of the presidential sequestration order — it is unquestionable that a judicial remedy exists. If we declare the automatic deficit reduction process invalid, no cancellation of the COLA benefits will occur as a result of that process.[5] Rather, the fallback deficit reduction process established by subsection 274(f) will come into play,[6] and any cancellation of COLAs under that process will require the passage of legislation. The mere possibility that subsequent legislation might produce the same harm for which a judicial remedy is sought is not sufficient to eliminate redressability and hence standing. *Cf. Orr v. Orr*, 440 U.S. 268, 272 (1979).

---

[5] Although the provision for COLA suspensions would survive invalidation of the portions of the Act under challenge here, it cannot be argued that indefinite suspension (*i.e.*, suspension unless and until a joint resolution is enacted) would render our invalidation of automatic cancellatioh illusory. It is clear from the language and structure of § 252(a)(6)(C)(i)-(ii) that any COLA suspension would extend no longer than one fiscal year.

[6] In light of the existence of the fallback process and the fact that the remainder of the Act, as supplemented by that process, functions as a coherent piece of legislation, there is no doubt that the automatic deficit reduction process is severable from the remainder of the Act.

Because the threatened injury of permanent cancellation of the COLA benefits pursuant to an unconstitutional process may be redressed, we conclude that NTEU has standing to bring its action.

B

Of the three types of injury that the congressional plaintiffs rely upon for standing, briefly outlined above, we need consider only their claim that the automatic deficit reduction process interferes with their constitutional duties to enact laws regarding federal spending and infringes upon their lawmaking powers under the Constitution, in that spending reductions made pursuant to the challenged process will, in effect, override earlier, duly enacted appropriations laws in a manner other than that prescribed by Article I, section 7. In response, the United States contends that this injury is nothing more than a generalized grievance shared by all other citizens and thus insufficient to support standing.

Under the law of this Circuit, which recognizes a personal interest by Members of Congress in the exercise of their governmental powers, limited by an equitable discretion in the courts to withhold specific relief,[7] we conclude that standing exists. Although it is somewhat difficult to reconcile the various cases on congressional standing in this Circuit, and in particular to tell which denials of relief in earlier cases, seemingly for lack of standing, are now to be explained, in light of later cases, as resting upon an exercise of equitable discretion, the cases clearly recognize that specific injury to a legislator in his official capacity may constitute cognizable harm sufficient to confer standing upon him. *See*, *e.g.*, *Moore v. United States House of Representatives*, 733 F.2d

---

[7] Two judges of the Court of Appeals, including a member of the present panel, have expressed disagreement with this analysis, *see Barnes v. Kline*, 759 F.2d 21, 41 (D.C. Cir. 1985) (Bork, J., dissenting), *petition for cert. filed*, 54 U.S.L.W. 3346 (U.S. Nov. 5, 1985) (No. 85-781); *Moore v. United States House of Representatives*, 733 F.2d 946, 956 (D.C. Cir. 1984) (Scalia, J., concurring), *cert. denied*, 105 S. Ct. 779 (1985). It has, however, been adopted by several panels of the Court of Appeals and is the law of this Circuit.

946, 952 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 779 (1985); *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983); *Riegle v. Federal Open Market Committee*, 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981). More specifically, our Court of Appeals has held that "unconstitutional deprivations of a legislator's constitutional duties or rights . . . may give rise to standing if the injuries are specific and discernible." *Moore v. United States House of Representatives*, 733 F.2d at 952 (citing *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974); *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977); and *American Federation of Government Employees v. Pierce*, 697 F.2d 303 (D.C. Cir. 1982) (per curiam)). Put another way, a Member of Congress may have standing where he alleges a " 'specific and cognizable' [injury] arising out of an interest 'positively identified by the Constitution.' " *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1381 (D.C. Cir. 1984) (quoting *Moore v. United States House of Representatives*, 733 F.2d at 951).

Applying these standards to the instant case, we conclude that plaintiffs have alleged specific and cognizable injury sufficient to establish standing in their official capacities. The congressional plaintiffs claim that they are and will continue to be injured by the operation of the automatic deficit reduction process because it interferes with their "constitutional duties to enact laws regarding federal spending" and infringes upon their lawmaking powers under Article I, section 7. Accepting as true plaintiffs' allegations, as we must for purposes of determining their standing, the Act unconstitutionally gives to the Comptroller General and the President formal power to amend or repeal appropriations legislation that was lawfully passed, and thus effectively to nullify plaintiffs' votes on that earlier legislation. This claim of injury is "specific" and "discernible"; and it arises out of an interest "identified by the Constitution," that is, a congressional interest in having all laws made in the manner prescribed under the general lawmaking provision contained in Article I, section 7. This interest differs significantly from the more abstract and generalized interest unsuccessfully asserted by lawmakers in United Presbyterian Church in the U.S.A. v. Reagan, 738 F.2d at 1375, and Harrington v. Bush, 553 F.2d at 190, viz., the interest in preventing unlawful executive enforcement of a statute from "diminishing the effectiveness" of, or "nullifying," past votes on that statute. Permitting lawmakers to assert the latter interest would be tantamount to giving them standing to challenge the lawfulness of all executive action taken under a statute; entertaining the present suit would not.

Finally, we find no occasion to consider exercising the equitable discretion held by this Circuit's cases to justify denial of specific or declaratory relief to Members of Congress. Section 274 of the Act specifically provides for such relief to such plaintiffs, thus eliminating whatever equitable discretion might exist and leaving only the limitations of Article III.

III

Plaintiffs contend that the Act's delegation to administrative officials of the power to make the economic calculations that determine the estimated federal deficit and hence the required budget cuts violates the constitutional provision vesting "all legislative power" in the Congress. See Art. I, § 1. It is strictly unnecessary for us to reach this point, since we hold in Part IV of this opinion that the challenged provisions of the Act are unconstitutional on other grounds. We think it appropriate, however, in light of the injunction of subsection 274(c) of the Act that we "expedite to the greatest possible extent the disposition" of these cases, and in light of the direct appeal to the Supreme Court provided by subsection 274(b), that we depart from normal prudential practice and provide our views obiter dicta. We thereby avoid the necessity that the Supreme Court, if in its judgment the point must be reached, must either proceed without the usual benefit of a lower-court opinion or else delay final disposition by remanding for that purpose.

A

The delegation doctrine is rooted in the principle of separation of powers that underlies the three-branch system of government established by the Constitution. As the Supreme Court stated in *Field v. Clark,* 143 U.S. 649, 692 (1892): "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

In the first century and a half of the nation's history, however, the Court uniformly held that challenged statutes did not unconstitutionally delegate legislative power. *See, e.g., Federal Radio Commission v. Nelson Brothers Bond & Mortgage,* 289 U.S. 266 (1933); *J. W. Hampton, Jr. & Co. v. United States,* 276 U.S. 394 (1928); *United States v. Grimaud,* 220 U.S. 506 (1911). As Chief Justice Taft explained in a passage that has become the classic exposition of the governing test, the separation-of-powers principle does not prevent the legislative branch from seeking the "assistance" of coordinate branches; "the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination"; and so long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *J. W. Hampton,* 276 U.S. at 406, 409.

In 1935, however, the Court used the delegation doctrine to strike down portions of the National Industrial Recovery Act of 1933. *See A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935). In these cases, the Court concluded that Congress had failed to articulate a policy or set of standards which would serve to confine the discretion of the individuals exercising the delegated authority. *See Schechter,* 295 U.S. at 541-42; *Panama Refining,* 293 U.S. at 430. These two cases are the only cases in which the Court has declared a statute unconstitutional by reason of undue delegation.[8]

In the fifty years since Schechter was decided, the Court has consistently rejected delegation challenges.[9] Nominally, it has continued to apply the same test (as Schechter and Panama Refining themselves nominally applied the same test as J. W. Hampton), scrutinizing the challenged statutes for intelligible standards and statements of purpose which could provide guidance to the officials to whom authority was delegated. See, e.g., Yakus v. United States, 321 U.S. 414, 424-25 (1944); Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 165-66 (1941); Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126, 144 (1941); United States v. Rock Royal Co-operative, 307 U.S. 533, 574 (1939). Pragmatically, however, the Court's decisions display a much greater deference to Congress' power to delegate, motivated in part by concerns that, "[I]n an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy." Opp Cotton Mills, 312 U.S. at 145. In Yakus, 321 U.S. at 425-26, the Court noted:

---

[8] The delegation doctrine was also discussed by the Court in Carter v. Carter Coal Co., 298 U.S. 238 (1936). There the Court ruled that a provision in the Bituminous Coal Conservation Act of 1935 which authorized various majorities of coal producers and mine workers to set maximum hours and minimum wages for all miners was unconstitutional. Id. at 311. The Court denounced that provision as "legislative delegation in its most obnoxious form," but the Court's holding appears to rest primarily upon denial of substantive due process rights. Id.

[9] See, e.g., United States v. Mazurie, 419 U.S. 544, 556-57 (1975); United States v. Sharpnack, 355 U.S. 286, 297 (1958); District of Columbia v. John R. Thompson Co., 346 U.S. 100, 110 (1953); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542-44 (1950); Lichter v. United States, 334 U.S. 742, 774-75 (1948); Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144-45 (1948); Fahey v. Mallonee, 332 U.S. 245, 250 (1947); American Power & Light Co. v. SEC, 329 U.S. 90, 104-05 (1946); Bowles v. Willingham, 321 U.S. 503, 516 (1944); Yakus v. United States, 321 U.S. 414, 426 (1944); National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943); Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 165 (1941); Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126, 146 (1941); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 397 (1940); United States v. Rock Royal Co-op., 307 U.S. 533, 574 (1939); Mulford v. Smith, 307 U.S. 38, 48-49 (1939); Currin v. Wallace, 306 U.S. 1, 15 (1939).

> It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework. . . .
>
> . . . .
>
> . . . Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose . . . .

The Supreme Court has endeavored to narrow the application of Schechter and Panama Refining by noting that those cases involved "delegation of a power to make federal crimes of acts that never had been such before and to devise novel rules of law in a field in which there had been no settled law or custom," Fahey v. Mallonee, 332 U.S. 245, 249 (1947), and that Schechter concerned a statute which delegated regulatory power to private individuals, see Yakus, 321 U.S. at 424. These attempts at narrowing the cases, and the Supreme Court's failure to use the delegation doctrine to strike down a statute in fifty years, have led some to conclude that the delegation doctrine is dead, or at least "moribund." See National Cable Television Association v. United States, 415 U.S. 336, 353 (1974) (Marshall, J., dissenting). The Court has continued to use the doctrine, however, in an interpretive mode, finding that statutory texts conferring powers on the Executive should be construed narrowly where broader construction might represent an unconstitutional delegation. See, e.g., Industrial Union Department v. American Petroleum Institute, 448 U.S. 607, 646 (1980) (opinion of Stevens, J.); National Cable Television Association, 415 U.S. at 342; Zemel v. Rusk, 381 U.S. 1, 17-18 (1965); Kent v. Dulles, 357 U.S. 116, 129 (1958). Such cases indicate that while the delegation doctrine may be moribund, it has not yet been officially interred by the Court.

Our analysis of the delegation challenged in the instant cases thus proceeds on the assumption that the delegation doctrine remains valid law, but that its scope must be determined on the basis of the deferential post-Schechter cases decided by the Supreme

Court. We note, moreover, that the mode of analysis applied by the Supreme Court in this field relies substantially upon factual comparison of the delegation under challenge with delegations previously adjudicated. See, e.g., Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144-46 (1948); American Power & Light Co. v. SEC, 329 U.S. 90, 104-05 (1946); Opp Cotton Mills, 312 U.S. at 146; Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940). With that teaching firmly in mind, we turn to the arguments raised by plaintiffs.

B

Plaintiffs advance a number of arguments that attempt to establish what might be termed per se nondelegability of the powers at issue here -- as opposed to arguments, which we will discuss in the following section, going to deficiency in the standards governing the delegation. Plaintiffs begin by arguing that the type of authority delegated by the Act is "so central to the legislative function" that it may not be delegated. They cite the dictum of Chief Justice Marshall in support of the notion that there exist certain nondelegable "core functions" of Congress:

> The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details.

Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825). The legislative power over appropriations conferred by Article I, section 8, clause 1 and Article I, section 9, clause 7 is said to constitute such a nondelegable "core function," particularly where the delegated authority could affect the functioning of a broad range of federal programs and, plaintiffs allege, would allow "unelected bureaucrats" to "override" portions of duly enacted appropriations laws.

We reject this "core functions" argument for several reasons. First, plaintiffs cite no case in which the Supreme Court has held any legislative power, much less that over appropriations, to be nondelegable due to its "core function" status. Indeed, in Lichter v. United States, 334 U.S. 742, 778-79 (1948), the Court stated flatly that "[a] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes." Second, judicial adoption of a "core functions" analysis would be effectively standardless. No constitutional provision distinguishes between "core" and "non-core" legislative functions, so that the line would necessarily have to be drawn on the basis of the court's own perceptions of the relative importance of various legislative functions. Finally, if there were any nondelegable "core functions," there is no reason to believe that appropriations functions would be among them. The appropriations power is not functionally distinguishable from other powers successfully delegated by Congress,[10] and is particularly akin to the taxing power, which is similarly derived from Article I, section 8, clause 1 of the Constitution. In upholding a statute which delegated the latter power by permitting the President to determine whether to increase duties on certain articles in foreign commerce, the Supreme Court said:

> It is conceded by counsel that Congress may use executive officers in the application and enforcement of a policy declared in law by Congress, and authorize such officers in the application of the Congressional declaration to enforce it by regulation equivalent to law. But it is said that this never has been permitted to be done where Congress has exercised the power to levy taxes and fix customs duties. The authorities make no such distinction. The same principle that permits Congress to exercise its rate making power in interstate commerce, by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise.

---

[10] The Supreme Court has, of course, frequently upheld delegation of regulatory authority under the commerce clause power. Delegations of authority conferred by many other constitutional provisions also have been sustained, however. It has been held, for example, that Congress properly delegated power over immigration, see INS v. Chadha, 462 U.S. 919, 953-54 n.16 (1983); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542-44 (1950); the power to determine what constitutes a federal crime, see United States v. Sharpnack, 355 U.S. 286 (1958); United States v. Grimaud, 220 U.S. 506 (1911); and the power to legislate for the District of Columbia, even though the Constitution describes that power as "exclusive" in Congress. See District of Columbia v. John R. Thompson Co., 346 U.S. 100 (1953). Moreover, in Lichter, 334 U.S. at 778-79, the Court stated that Congress' power to delegate "is especially significant in connection with constitutional war powers."

J. W. Hampton, 276 U.S. at 409; see also Field v. Clark, 143 U.S. at 680-94.

The second contention that may be viewed as going to per se nondelegability of the authority conferred by the Act (though it is related to the issue of inadequate standards) concerns the breadth of the power allocated to administrative officials, which plaintiffs assert is constitutionally excessive. There is no doubt that the Act delegates broad authority, but delegation of similarly broad authority has been upheld in past cases. In Yakus, for example, the Court upheld a statute which delegated to an unelected Price Administrator the power "to promulgate regulations fixing prices of commodities." 321 U.S. at 420. In Bowles v. Willingham, 321 U.S. 503, 512, 514-15 (1944), it upheld the delegation of power to institute rent controls on real property anywhere in the nation under specified circumstances. Finally, in Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 745, 763 (D.D.C. 1971), a three-judge district court upheld a delegation of authority to the President "to issue such orders and regulations as he deems appropriate to stabilize prices, rents, wages and salaries." The authority conferred by the present Act, which permits administrators to affect spending levels for a specified range of federal programs, and only to a certain degree, seems to us no broader than these delegations that have been upheld. We think, in any event, that the ultimate judgment regarding the constitutionality of a delegation must be made not on the basis of the scope of the power alone, but on the basis of its scope plus the specificity of the standards governing its exercise. When the scope increases to immense proportions (as in Schechter) the standards must be correspondingly more precise. As we shall see, the standards governing the power here are much more specific than in the cases just described.

Nor is it the law, as plaintiffs assert, that a broad delegation such as this must be supported by some rigorous "principle of necessity" which is allegedly not met here because Congress has exercised sole power over appropriations in the past and presumably could continue to do so. To be sure, in delegation cases the Supreme Court has occasionally recognized the "necessity" for a delegation. See, e.g., Buttfield v. Stranahan, 192 U.S. 470, 496 (1904). It is doubtful, however, that the word "necessity" in that context, any more than the word "necessary" in the "necessary and proper" clause of the Constitution, refers to an "absolute physical necessity." See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413-15 (1819). Rather, necessity refers to a strong utility and convenience, which can certainly be considered to exist here. In any case, while "necessity" has been noted by the Court in upholding a delegation, "lack of necessity" has never been invoked to strike one down. The same response may be made to plaintiffs' argument based upon what they consider the long (six-year) duration of the present broad delegation: while extremely limited duration has been invoked as one of the elements sustaining a delegation, lengthy duration has never been held to render one void. The delegations upheld in J.W. Hampton, 276 U.S. at 394, and Field v. Clark, 143 U.S. at 649, for example, were for indefinite terms.

Finally, plaintiffs argue that the present delegation is per se invalid because it allows administrators to "nullify" or "override" laws. Again we disagree. The Supreme Court previously has upheld delegations which permit officials to determine when, if ever, a law should take effect. See, e.g., Rock Royal Co-operative, 307 U.S. at 577-78; Currin v. Wallace, 306 U.S. 1, 15-16 (1939); Field v. Clark, 143 U.S. at 693; The Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 388 (1812). In such cases, the Court classifies Congress' action as legislating in contingency. The instant Act is no more than a form of such contingent legislation. Throughout the Act, Congress has stipulated that the full effectiveness of all appropriations legislation enacted for fiscal years 1986 to 1991 will be contingent upon the administrative determination whether all appropriated funds, when measured against revenues, result in a budget deficit in excess of required target figures. Viewed in this context, the authority delegated by the Act does not differ in kind from that approved in prior cases.

C

We come, then, to what is the plaintiffs' principal argument on the excessive delegation point: that because of the lack of standards and the inherent imprecision of the duties conferred upon the administrators, the Act fails adequately to confine the exercise of administrative discretion. The search for adequate standards to restrict administrative discretion lies at the heart of every delegation challenge. The essential inquiry is whether the specified guidance "sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will." Yakus, 321 U.S. at 425.

Our consideration of this objection requires a careful review of the statute. The Act begins by establishing a "maximum deficit amount" for each fiscal year between 1986 and 1991. Act § 201(a)(1). It then requires the Directors of the OMB and the CBO to estimate the anticipated "budget base levels of total revenues and budget outlays" for a given fiscal year, to determine whether the projected deficit for that year will exceed the maximum deficit amount for that year by more than a specified amount, and to estimate the rate of real economic growth that will occur during that fiscal year, as a whole and by quarters, and the rate of real economic growth that occurred during each of the last two quarters of the preceding fiscal year. Id. § 251(a)(1). The Directors are then jointly to report their conclusions to the Comptroller General. Id. § 251(a)(2).[11]

The Comptroller General is instructed to "review and consider the report" and, "with due regard for the data, assumptions, and methodologies used in reaching the conclusions set forth therein," issue his own report making the same type of estimates and determinations contained in the Directors' report. Act § 251(b)(1)-(2). The

---

[11] These conclusions all contribute to the calculation of whether the estimated deficit for a given fiscal year exceeds the maximum deficit amount by more than the amount specified in § 251(a)(1)(B) of the Act. Only if it does so will the Directors recommend spending reductions. See Act § 251(a)(2). Plaintiffs do not challenge the procedure by which the administrators are to allocate the spending reductions necessary to reduce the deficit excess.

Comptroller General's report is to "be based on the estimates, determinations, and specifications of the Directors and shall utilize the budget base, criteria, and guidelines set forth" in specified sections of the Act. Id. § 251(b)(1). The report must "fully explain" any differences between its determinations and those included in the report of the Directors. Id. § 251(b)(2).[12]

In considering whether this scheme contains constitutionally adequate legislated standards, we first observe that it does set forth specific assumptions that are to be used in calculating the budget base. See Act § 251(a)(6). The administrative officials are directed to assume, with some specified exceptions, "the continuation of current law in the case of revenues and spending authority," id. § 251(a)(6)(A), (C)[13] and, in all areas to which the preceding assumption is inapplicable, "appropriations equal to the prior year's appropriations except to the extent that annual appropriations or continuing appropriations for the entire fiscal year have been enacted." Id. § 251(a)(6)(B). They must assume that "expiring provisions of law providing revenues and spending authority . . . do expire, except that excise taxes dedicated to a trust fund and agricultural price support programs administered through the Commodity Credit Corporation are extended at current rates." Id. § 251(a)(6)(C). Additionally, they must assume that "Federal pay adjustments for statutory pay systems" will be as recommended by the President and will not result in pay reductions and that Medicare spending levels for inpatient hospital services will be based upon specified regulations. Id. § 251(a)(6)(D). Finally, certain spending deferrals proposed by the President are not to be included in the calculation. Id. All of these directions relate to the required calculation of "budget base levels of total revenues and total budget outlays" for a fiscal year.

---

[12] In fiscal years 1987-1991, the Directors and the Comptroller General are required to submit revised reports under § 251(c) of the Act. We disregard that refinement for present purposes, since the types of determinations to be made in those revised reports do not differ from those required to be made in the initial reports.

[13] "Spending authority" is defined by reference to the Congressional Budget Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified in relevant part as amended at 2 U.S.C. §§ 631-631 (1982)). The relevant provision states that "spending authority" means temporary or permanent authority related to government contractual obligations, the incurring of indebtedness, and the making of certain payments, such as for loans and grants, if such budget authority is "not provided for in advance by appropriations Acts." 2 U.S.C. § 651(c)(2). "Spending authority" does not include authority "to insure or guarantee the repayment of indebtedness incurred by another person or government." Id. § 651(c).

The Act provides further guidance and limitation by way of definition. The "real economic growth" to be calculated is defined as "the growth in the gross national product during such fiscal year, adjusted for inflation, consistent with Department of Commerce definitions." Act § 257(6). "Budget outlays" and "budget authority" are defined by reference to provisions of the Congressional Budget and Impoundment Control Act of 1974.[14] "Deficit" is defined as "the amount by which total budget outlays for such fiscal year exceed total revenues for such fiscal year." Id. §§ 257(4), 201(a)(1). Moreover, the latter definition provides certain criteria for calculation of the deficit. See id. § 201(a)(1).[15]

These required assumptions and definitions are given additional meaning by reference to years of administrative and congressional experience in making similar economic projections and calculations under the Congressional Budget Act of 1974.[16] The present Act's references to the 1974 Act and to Department of Commerce regulations manifest Congress' intent that past practice should inform the administrators' calculations. The standards set by this Act thus "derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear." *American Power & Light Co.*, 329 U.S. at 104; *see also Lichter*, 334 U.S. at 785 ("Standards prescribed by Congress are to be read in the light of the conditions to which they are to be applied."); *Amalgamated Meat Cutters*, 337 F. Supp. at 748 (standards set by statute are defined in part by consideration of experience under previous wage and price stabilization statutes). Additionally, we note that the economic calculation standards, which might seem vague and confusing to laymen, will have more precise meaning to officials accustomed to making such determinations. Here, as in *Sunshine Anthracite Coal Co.*, 310 U.S. at 398, "in the hands of experts the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose of the Act."

---

[14] Pub. L. No. 93-344, 88 Stat. 297 (codified in relevant part as amended at 2 U.S.C. §§ 621-688 (1982)). "Budget outlays" means, "with respect to any fiscal year, expenditures and net lending of funds under budget authority during such year." 2 U.S.C. § 622(1). "Budget authority" means "authority provided by law to enter into obligations which will result in immediate or future outlays involving Government funds, except that such term does not include authority to insure or guarantee the repayment of indebtedness incurred by another person or government." Id. § 622(2).

[15] These criteria relate, inter alia, to treatment of Social Security funds and the "receipts, revenues, disbursements, budget authority, and outlays of each off-budget Federal entity." Act § 201(a)(1).

[16] Under the 1974 Act, the CBO is required to perform a number of economic calculations. For example, near the beginning of each fiscal year, it must issue a report projecting for five fiscal years the total new budget authority and total budget outlays for each fiscal year in that period, revenues to be received in each fiscal year, the anticipated surplus or deficit, and the amount of "tax expenditures." 2 U.S.C. § 639(c) (1982).

We are of the clear view that the totality of the Act's standards, definitions, context, and reference to past administrative practice provides an adequate "intelligible principle" to guide and confine administrative decisionmaking. It is unquestionably true, as plaintiffs point out, that in making the assessments of current facts and the predictions of future facts that the statute requires, a good deal of judgment is involved, and different individuals faithfully seeking to follow Congress' instructions may reach different results. Nevertheless, the discretion involved in assessing current facts and predicting future ones is inseparable from administration of the law, and it is one of the reasons we consider it important to elect our Chief Executive. If the facts and predictions here are difficult to ascertain, they are no more so than many others committed to the charge of administrative officials, such as the complex economic calculations required of the agencies that determine the discount rate, the consumer price index, and the gross national product. What is significant about this case, and what distinguishes it from many other cases in which delegation has been upheld, is that the only discretion conferred is in the ascertainment of facts and the prediction of facts.[17] The Comptroller General is not made responsible for a single policy judgment as to, for example, what is a "fair price," see Yakus, 321 U.S. at 414, or when it would be "appropriate" to freeze wages and prices, see Amalgamated Meat Cutters, 337 F. Supp. at 737, or wherein lies the "public interest," see National Broadcasting Co. v. United States, 319 U.S. 190 (1943). Compared with the cases upholding administrative resolution of such issues, the present delegation is remote from legislative abdication. Congress "is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officials." Yakus, 321 U.S. at 425-26.

D

Finally, we consider plaintiffs' argument that the delegation is unlawful because of the preclusion of judicial review. Section 274(h) of the Act provides that "[t]he economic data, assumptions, and methodologies used by the Comptroller General in computing the base levels of total revenues and total budget outlays . . . shall not be subject to review in any judicial or administrative proceeding." This is of course not a total preclusion of judicial review with respect to all action taken under the Act. It does not restrict the bringing of constitutional challenges; indeed, in subsection 274(a), the Act endeavors to facilitate this type of judicial review by broadly designating those who may bring such suits. In addition, subsection 274(g) preserves the rights guaranteed by other laws; thus, there is nothing to prevent a court from determining whether the operation of the Act improperly infringes upon such rights. Moreover, by its terms, subsection 274(h) would not prevent a court from determining whether the Comptroller

---

[17] Of course the Comptroller General must interpret the law in applying the provisions of the Act, a point that will be relevant to the separation-of-powers discussion in Part IV of this opinion. Whether or not that power can appropriately be considered a "discretion," it is necessarily possessed by all officers charged with administration of the law and therefore cannot possibly cause problems of unconstitutional delegation.

General failed to make one of the assumptions required by subsection 251(a)(6). Additionally, since the judicial review preclusion extends only to determination of "base levels of total revenues and total budget outlays," a court presumably could determine whether the Comptroller General had complied with the deficit calculation criteria contained in subsection 201(a)(1). Nor are courts precluded from considering whether any allocation of spending reductions is made pursuant to statutory standards. Finally, the Act expressly provides for review of the presidential sequestration orders to determine their compliance with statutory requirements. See Act § 274(d).

The Act does insulate, however, those exercises of judgment by the Comptroller General that the plaintiffs challenge and that we have approved above. Plaintiffs argue that a condition of the validity of, if not all delegations, at least a delegation as broad as that here at issue, is the availability of judicial review of its exercise. We do not agree. To be sure, the Supreme Court has sometimes alluded to the availability of judicial review in its catalogue of factors such as "necessity" and "limited duration," discussed above, validating the delegation. In Opp Cotton Mills, for example, it said that

> where . . . the standards set up for the guidance of the administrative agency, the procedure which it is directed to follow and the record of its action which is required by statute to be kept or which is in fact preserved, are such that Congress, the courts and the public can ascertain whether the agency has conformed to the standards which Congress has prescribed, there is no failure of performance of the legislative function.

312 U.S. at 144 (emphasis added). And more recently, in INS v. Chadha, it noted in dictum that the exercise of delegated authority "is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely." 462 U.S. at 953-54 n.16.

These allusions cannot be thought to establish the principle that judicial review is essential to sustain a delegation, since the exercise of many validly delegated authorities is statutorily insulated from judicial review. See, e.g., Southern Railway v. Seaboard Allied Milling Corp., 442 U.S. 449, 454-64 (1979) (construing provision of Interstate

Commerce Act); Thompson v. Clark, 741 F. 2d 401, 404-05 (D.C. Cir. 1984) (construing provision of Regulatory Flexibility Act). Even the more limited principle that judicial review can "save" a delegation that would otherwise be invalid is questionable, since if the requisite minimum standards have in fact not been established by Congress, permitting them to be invented by the courts rather than by the administrator is no less a delegation of political power, and arguably a worse one, since it is to a nonpolitical branch, and a branch even less subject to congressional controls. In any event, since we do not regard the present delegation as close to the line of invalidity, and since judicial review of almost all of the administrative determinations remains available, we find that insulating from judicial review the "economic data, assumptions, and methodologies used . . . in computing the base levels of total revenues and total budget outlays" provides no basis for finding the delegation invalid.

* * * * *

In sum, our review of the aggregate effect of the factors identified by the plaintiffs leads us to conclude that the delegation made by the Act passes constitutional muster. Apart from the technicalities of the matter, the realities produce the same conclusion. It seems to us not true, as plaintiffs have asserted, that Congress has declined to make the "hard political choices." To the contrary, it has decided to impose the severe constriction of federal spending necessary to produce a balanced budget by fiscal year 1991, it has established an intricate administrative mechanism to address that goal, and it has specified in meticulous detail which program budgets will be reduced in order to achieve that result, and by how much. See generally Act §§ 251(a)(3), 255, 256. All that has been left to administrative discretion is the estimation of the aggregate amount of reductions that will be necessary, in light of predicted revenues and expenditures, and we believe that the Act contains standards adequately confining administrative discretion in making that estimation. While this is assuredly an estimation that requires some judgment, and on which various individuals may disagree, we hardly think it is a distinctively *political* judgment, much less a political judgment of such scope that it must be made by Congress itself. Through specification of maximum deficit amounts, establishment of a detailed administrative mechanism, and determination of the standards governing administrative decisionmaking, Congress has made the policy decisions which constitute the essence of the legislative function. It "has defined the circumstances when its announced policy is to be declared operative and the method by which it is to be effectuated. Those steps constitute the performance of the legislative function in the constitutional sense." *Bowles v. Willingham*, 321 U.S. at 514. Accordingly, plaintiffs' delegation challenge is rejected.

IV

We turn to the next major objection to the Act's automatic deficit reduction process, pressed in particular by the United States: that the role of the Comptroller General in that process is invalid because he does not possess the constitutional qualifications to perform it.[18] The objection takes various forms, but the only one we find it necessary to address is the contention that the Act confers upon the Comptroller General powers which are executive in nature, and which therefore cannot be conferred upon an officer who lacks the degree of independence from Congress that their exercise constitutionally requires. Specifically, the government objects to the fact that the Comptroller General, while appointed by the President with the advice and consent of the Senate, is removable not only by impeachment (as are all officers of the United States) but also by joint resolution of Congress for specified causes, including inefficiency and neglect of duty.[19]

---

[18] It is argued by some of the plaintiffs that the Act in reality confers power not upon the Comptroller General but rather upon the Directors of the OMB and the CBO, whose joint report the Comptroller General assertedly will "rubber-stamp." We find that assertion unconvincing, and thus direct our attention to the separation-of-powers concerns raised by the Comptroller General's formal powers under the Act. Of course, if it were true and relevant that the exercise of those powers would effectively be dictated by the Directors, our conclusion that the Act unconstitutionally vests executive powers in an official removable in a manner inconsistent with the exercise of such powers would be *a fortiori* correct, because the Director of the CBO is removable by resolution of either House. *See* 2 U.S.C. § 601(a)(4) (1982).

A

Three threshold objections are raised to our consideration of this issue as a basis for invalidating the automatic deficit reduction process. First, intervenors argue that, until removal is attempted, the issue of the effect of the Comptroller General's removability upon his powers is not ripe for adjudication. This argument is flatly contradicted by the decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). There the Supreme Court adjudicated (and in fact found meritorious) the claim that bankruptcy judges who were appointed to fixed fourteen-year terms, subject to removal for cause by the judicial council of the circuit in which they served, and whose salaries were not immune from possible diminution, could not constitutionally exercise certain of the powers granted them by the Bankruptcy Act of 1978 — notwithstanding the fact that no removal or salary diminution had been attempted. 458 U.S. at 60-61, 87 (plurality opinion).

Intervenors seek to distinguish Northern Pipeline on the asserted ground that the Court focused its attention on what they describe as the constitutionally defective tenure provision that had already been exercised (viz., under their analysis, the provision appointing bankruptcy judges to a fixed term), rather than the ones that had not yet been exercised (viz., the provisions permitting removal during the fixed term and reduction of salary). As a factual matter, the assertion is not true. The Northern Pipeline Court focused no more of its attention on the fixed-term provision than on the removal-for-cause provision or the absence of statutory protection against diminution in salary; it simply noted all three problems, drawing no distinction among them on "ripeness" or any other grounds. Northern Pipeline, 458 U.S. at 60-61. Moreover, the very notion that the constitutional vice in Northern Pipeline had been "exercised," while in the present case the asserted constitutional vice has not been, strikes us as little more than semantic legerdemain. In the same sense in which the bankruptcy judges had already been appointed to positions with a fixed term, the Comptroller General has already been appointed to a position subject to congressional removal; and in the same sense that the congressional removal provision has not yet been applied in this case, neither had the provision requiring judges to step down after fourteen years in Northern Pipeline. It is true, of course, that the expiration of fourteen years was certain to occur while in the present case congressional removal is not. But that is quite irrelevant to whether the two provisions differ in their immediate impact, so that one is more "ripe" for review than the other. The immediate impact in Northern Pipeline came not from the certainty of expiration of fourteen years, but from the bankruptcy judge's awareness of the possibility of non-reappointment. It is his presumed desire to avoid that possibility by pleasing the appointing power, just as in the present case it is the Comptroller General's presumed desire to avoid removal by pleasing Congress, which creates the here-and-now subservience to another branch that raises separation-of-powers problems.[20]

---

[19] The provision of law governing the Comptroller General's removal reads as follows:

> A Comptroller General or Deputy Comptroller General retires on becoming 70 years of age. Either may be removed at any time by —
> (A) impeachment; or
> (B) joint resolution of Congress, after notice and an opportunity for a hearing, only for —
> (i) permanent disability;
> (ii) inefficiency;
> (iii) neglect of duty;
> (iv) malfeasance; or
> (v) a felony or conduct involving moral turpitude.

31 U.S.C. § 703(e)(1) (1982).

---

[20] Intervenors also seek to find support for their ripeness argument in Clark v. Valeo, 559 F.2d 642 (D.C. Cir.) (en banc) (per curiam), aff'd mem., 431 U.S. 950 (1977), and Muller Optical Co. v. EEOC, 743 F.2d 380 (6th Cir. 1984). It is not there. Clark, to be sure, rejected a challenge to a legislative veto provision as unripe because the provision (cont'd)

The second threshold argument, made by the Senate, is that, since the manner of removal that the Comptroller General's tenure statute embodies[21] is functionally the same as new legislation, there is no more reason for us to consider whether the existence of that tenure statute invalidates the present Act than there would be to consider, in the absence of such a statute, whether the possibility of Congress' passing a law removing the Comptroller General would invalidate the Act. We disagree. Insofar as justiciability and ripeness are concerned, the mere possibility that Congress might seek to remove an officer is no more comparable to its formal assertion (by legislation) of the power to do so, than is the mere possibility of an agency's punishing certain conduct comparable to its formal assertion (by rule) of the power to do so. Cf. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). It is the prior assertion of authority to remove embodied in the tenure statute that has the immediate effect, and presumably the immediate purpose, of causing the Comptroller General to look to the legislative branch rather than the President for guidance. And it is this, in turn, that constitutes the asserted evil of which the plaintiffs complain. The logic of the Comptroller General's argument leads to the conclusion that a tenure statute providing for removal of a judge exercising Article III powers by joint

---

had not been exercised. But Clark involved a naked attack upon the provision itself and not, like the present case, a challenge to present use of the statutory powers to which the provision was attached. And Muller, which did address a challenge comparable to the present case, implicitly rejects rather than supports intervenors' ripeness argument, deciding on the merits a claim that the existence of an unexercised legislative veto provision in a statute rendered actions taken under that statute unconstitutional. Muller, 743 F.2d at 388. See also Alaska Airlines, Inc. v. Donovan, 766 F.2d 1550 (D.C. Cir. 1985) (holding on the merits that the existence of an unexercised legislative veto provision in a statute would render invalid actions taken under the statute unless the legislative veto provision were severable from the portion of the statute pursuant to which the challenged actions were taken), petition for cert. filed, 54 U.S.L.W. 3394 (U.S. Nov. 27, 1985) (No. 85-920).

[21] The statute provides for removal by joint resolution, which requires either presidential approval or passage by a two-thirds vote of both Houses of Congress over a presidential veto. In assessing the compatibility of such a provision with the constitutional doctrine of separation of powers, we think it most appropriate to focus our attention on the latter possibility — that Congress could remove the Comptroller General despite presidential opposition — and we therefore refer to the provision as authorizing congressional removal.

resolution could similarly not be challenged, a prospect we are not prepared to entertain.

Intervenors' last threshold argument is that, even if the powers granted to the Comptroller General under the Act cannot be conferred upon an officer removable by Congress, that conclusion does not necessarily invalidate the Act, but rather requires us to choose which of the two incompatible provisions (the powers in the Act or the removal authority) should be set aside. That decision, they assert, should turn primarily upon our estimation of which of the two provisions Congress would have wished to survive — which they maintain is the Act.

Intervenors do not refer us to, nor are we aware of, any case in which a court confronted with separate statutes, constitutionally incompatible in combination, has even considered choosing which of the two to invalidate, much less resolved that choice as intervenors suggest. To the contrary, as the cases specifically involving incompatible authorization and tenure (or appointment) statutes amply demonstrate, the courts set aside that statute which either allegedly prohibits or allegedly authorizes the injury-in-fact that confers standing upon the plaintiff. See Springer v. Government of the Philippine Islands, 277 U.S. 189 (1928) (removing from office, in quo warranto proceeding brought by Philippine Governor-General, officials exercising executive power but appointed by officers of Philippine legislature); Myers v. United States, 272 U.S. 52 (1926) (setting aside tenure-of-office statute that was the basis of postmaster's claim of unlawful presidential removal). Indeed, the Supreme Court has taken that approach even when the incompatible authorization and removal (or appointment) provisions are contained within the same enactment. See Northern Pipeline, 458 U.S. at 50 (setting aside exercise of adjudicatory authority over plaintiff by bankruptcy judge who lacked Article III life tenure); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) (setting aside Federal Election Campaign Act provisions granting authority over plaintiffs to officials appointed in a manner incompatible with the exercise of such authority).

Even if we were to agree, however, that when confronted with two separate provisions that cannot both be constitutionally sustained, we are free to choose between them, and are to make our choice on the basis of presumed congressional intent, we would conclude that in the present case it is the grant of powers under the Act that would have to fall. As the brief of Intervenor Speaker and Bipartisan Leadership Group of the House meticulously details, the grant of authority to the Comptroller General was a carefully considered protection against what the House conceived to be the pro-executive bias of the OMB. It is doubtful that the automatic deficit reduction process would have passed without such protection, and doubtful that the protection would have been considered present if the Comptroller General were not removable by Congress itself — much less if he were removable (as validation of his functions under this legislation might constitutionally require, a point we do not reach) at the discretion of the President, like the Director of the OMB himself.

A congressional intent that it is the Comptroller General's powers under this Act, rather than his manner of removal, that should yield if both cannot coexist is also strongly suggested by the fallback deficit reduction process specifically established by the Act to take effect if the automatic deficit reduction process is declared constitutionally infirm — especially since it is clear that one of the grounds of possible infirmity specifically brought to Congress' attention by the executive branch was the participation of the Comptroller General.[22] By reason of that fallback process, we might add, setting aside the grant of powers to the Comptroller General would result in a state of affairs that Congress unquestionably was willing to accept, whereas congressional acceptance of an automatic deficit reduction process administered by a Comptroller General unremovable by Congress (and perhaps removable at will by the

---

[22] See Statement on Signing H.J. Res. 372 Into Law, 21 Weekly Comp. Pres. Doc. 1490-91 (Dec. 12, 1985) ("[E]xecutive functions may only be performed by officers in the executive branch. The . . . Comptroller General [is an] agent[ ] of Congress, not [an] officer[ ] in the executive branch. . . . My administration alerted Congress to [this] . . . problem[ ] throughout the legislative process in an effort to achieve a bill free of constitutionally suspect provisions. . . . [W]e were unsuccessful in this goal . . . .").

President) is purely speculative. Indeed, even apart from the fallback process a decision setting aside the grant of powers under this Act rather than the separate statutory provision for the Comptroller General's removal would run much less risk of frustrating congressional intent. We have no idea how many powers of the Comptroller General, conferred upon him by other statutes, would not have been conferred if he were not subject to congressional removal.

We conclude, therefore, that the question whether the powers conferred upon the Comptroller General by the Act are constitutionally incompatible with his removability from office by Congress is ripe for our consideration; and that an affirmative answer requires invalidation of those powers. We turn to the merits of this issue.

B

The only portions of the Constitution explicitly addressing the power to remove officers of the United States[23] are the impeachment clauses, which provide that "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors," Art. II, § 4, and that the House of Representatives shall bring, and the Senate try, the impeachment, Art. I, § 2, cl. 5; Art. I, § 3, cl. 6. The appointments clause of the Constitution, which it is universally agreed has some bearing upon removal powers, reads as follows:

---

[23] "Officers" are to be distinguished from "employees," see Buckley v. Valeo, 424 U.S. at 126 & n.162, as to whom the congressional power to restrict or impose removal may be quite different. The distinction is not relevant to the present case, however, since it is conceded that the Comptroller General is an officer. There may also be a difference, at least insofar as Congress' ability to restrict the President's removal power is concerned, between those officers included within the meaning of the phrase "inferior Officers" in the appointments clause of the Constitution, whose manner of appointment that clause permits to be controlled to some degree by Congress (viz., to be vested "in the President alone, in the Courts of Law, or in the Heads of Departments," Art. II, § 2, cl. 2); and other officers, whom the appointments clause requires to be appointed by the President with the advice and consent of the Senate, id. See, e.g., Myers, 272 U.S. at 158-64; United States v. Perkins, 116 U.S. 483, 484-85 (1886) (dictum). That distinction also is not pertinent here, since no one contends, and it seems to us not seriously maintainable, that the Comptroller General is an "inferior Officer." Finally, there may be a distinction between "officers of the United States" and "officers of Congress," see Buckley v. Valeo, 424 U.S. at 127-28. Although it is not conceded that the Comptroller General comes within the former category (the government vigorously asserts the contrary), we find it unnecessary to decide the question, since if the Comptroller General is not an officer of the United States he is a fortiori unable to exercise the executive powers we find him unable to exercise on narrower grounds. Our analysis assumes, in other words, the more validating characterization of the office.

> . . . [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Art. II, § 2, cl. 2.

Since the early days of the Republic it has not been doubted that the Constitution implicitly confers upon the President power to remove civil officers whom he appoints, at least those who exercise executive powers. In what has come to be known in the legal literature as the "Decision of 1789," the First Congress, after heated debate, deleted from a proposed bill creating the Department of Foreign Affairs language which provided that the Secretary of Foreign Affairs was "to be removable from office by the President." The reason urged by the proponents of the deletion was that the original text implied the absence of a constitutionally conferred power of the President to effect the removal. See Myers, 272 U.S. at 111-36.

The extent to which the implicit presidential removal power extends beyond officers exercising executive powers, however, the extent to which it can be restricted by legislation, and the extent to which it can be conferred by legislation upon the Congress itself, have been the subject of Supreme Court pronouncements that are conflicting in their reasoning, if not in their results. See generally Burkoff, Appointment and Removal under the Federal Constitution: The Impact of Buckley v. Valeo, 22 Wayne L. Rev. 1335 (1976); Donovan & Irvine, The President's Power to Remove Members of Administrative Agencies, 21 Cornell L.Q. 215 (1936). The cases are few enough that their holdings and their principal rationales may be readily summarized.

In In re Hennen, 38 U.S. (13 Pet.) 230 (1839), the Court held that a district court clerk, who had been appointed by a district court judge pursuant to that provision of the Constitution authorizing Congress to vest the appointment of "inferior Officers . . . in the Courts of Law," could also be removed by a district court judge. The Court said that "[I]n the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment." Id. at 259.

In United States v. Perkins, 116 U.S. 483 (1886), the Court upheld an award of back pay to a cadet-engineer in the Navy, who had been appointed by the Secretary of the Navy and was dismissed by him in disregard of a statutory provision prohibiting dismissal of any naval officer in peacetime except by court martial. The Court quoted and approved the opinion of the Court of Claims stating that, regardless of what the situation might be with regard to officers appointed by the President by and with the advice and consent of the Senate under the self-operative provision of the Constitution,

> 'when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed.'

Id. at 485.

In Shurtleff v. United States, 189 U.S. 311 (1903), the Court held that a statute which provided that a particular Customs Department official "may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office" did not prevent presidential removal for other reasons, since such a limitation would have to be stated in "very clear and explicit language," id. at 315. The Court did not confront, therefore, the issue of whether such a limitation would be constitutional.

In Myers v. United States, 272 U.S. 52 (1926), the Court finally dealt with the constitutionality of a statutory provision giving Congress a role in the removal process.

The plaintiff was a postmaster, appointed by the President with the advice and consent of the Senate, for a four-year term; he was dismissed by the President despite a tenure-of-office act requiring advice and consent of the Senate for his removal. The Court found the limitation unconstitutional in a 71-page opinion by Chief Justice Taft exhaustively examining the historical record bearing upon the meaning of the applicable constitutional texts. The nub of the analysis is that, as the Decision of 1789 in the Court's view established, and as In re Hennen had held, "the power of removal [is] incident to the power of appointment," 38 U.S. (13 Pet.) at 259. The Constitution gives Congress no authority to limit that removal power, except, implicitly, in the provision authorizing Congress to provide for the appointment of inferior officers by means other than the constitutionally prescribed method of presidential appointment with Senate consent. At least where it exercises that authority in such fashion as to vest appointment in the head of a department, it "may prescribe incidental regulations controlling and restricting the [appointing officer] in the exercise of the power of removal." 272 U.S. at 161. Even in the latter situation, the Court added, for Congress to "draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power . . . . would be . . . to infringe the constitutional principle of the separation of governmental powers." Id. The opinion clearly regarded its holding as applicable to officers whose functions include "duties of a quasi-judicial character," id. at 135, including specifically the commissioners of the Interstate Commerce Commission, see id. at 171-72.

The next case, decided nine years later, warrants more extended attention, since it is the last major discussion by the Supreme Court of the constitutional authority of Congress over power of removal. Humphrey's Executor v. United States, 295 U.S. 602 (1935), was a suit for back pay by a commissioner of the Federal Trade Commission whom President Roosevelt had removed without cause. The Federal Trade Commission Act provided that commissioners "may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." The Court's opinion, by Justice Sutherland, first found that this language, unlike the virtually identical language involved in *Shurtleff*, did bar removal for other causes, distinguishing the earlier case on the basis that the office there involved had no term of appointment, whereas Federal Trade Commissioners were limited to a term of seven years. *Humphrey's Executor*, 295 U.S. at 619-26. Then, in six pages addressing the constitutional issue — two of which were spent discussing why the facts of *Myers* were distinguishable — the opinion swept away much of the reasoning of *Myers* (precisely how much is one of the issues before us) and simultaneously revolutionized separation-of-powers analysis. The Court said that the holding of *Myers* extended only to "purely executive officers," and that the constitutional prohibition it expressed did not apply to an officer like the Federal Trade Commissioner, who "occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President," but acts only "in the discharge and effectuation of . . . quasi-legislative[24] or quasi-judicial powers, or as an [officer of an] agency of the legislative or judicial departments of the government." 295 U.S. at 628.[25] As to the latter, it said, "illimitable power of removal is not possessed by the President," and Congress may "fix the period during which [the officer] shall continue in office, and . . . forbid . . . removal except for cause in the meantime." *Id.* at 629. This was said to be required by the doctrine of separation of powers, since "sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there," and since the "coercive influence [of unlimited presidential power of removal] threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which . . . was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments." *Id.* at 630.

---

[24] It is noteworthy, though generally not noted, that the "quasi-legislative" powers referred to in *Humphrey's Executor* were not substantive rulemaking powers, which the Federal Trade Commission itself did not assert it possessed until 1962, *see National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 693 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974), but rather the responsibility to conduct investigations for the purpose of recommending legislation to Congress. *See* 295 U.S. at 621, 628. Though the holding of *Humphrey's Executor* is necessarily limited to this sort of function, it is generally assumed (though without any Supreme Court holding to sustain the point) that rulemaking is a "quasi-legislative activity" for purposes of the rule of *Humphrey's Executor*. *See, e.g.*, *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983).

[25] The Court did note that the President was authorized to direct the Federal Trade Commission to investigate and report alleged antitrust violations, but described that activity to be an "executive function — as distinguished from executive power in the constitutional sense — [exercised] in the discharge and effectuation of [the Federal Trade Commission's] quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government." *Humphrey's Executor*, 295 U.S. at 628 & n.*. In this opinion, we are careful to direct our attention to the question whether the power that the Comptroller General exercises under the Act is "executive power in the constitutional sense."

The last Supreme Court decision involving the removal power was handed down almost three decades ago. *Wiener v. United States*, 357 U.S. 349 (1958), was another back-pay suit, by a commissioner of the War Claims Commission who had been removed by President Eisenhower without cause. It was uncontested that the Commission exercised only "quasi-judicial" functions, and the point at issue was whether Congress had prohibited presidential removal without cause. Despite the absence of any explicit prohibition, the Court found that

> [i]f, as one must take for granted, the War Claims Act precluded the President from influencing the Commission in passing on a particular claim, *a fortiori* must it be inferred that Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.

357 U.S. at 356.[26] Accordingly, *Humphrey's Executor* was held to render the removal unlawful.

---

[26] In other language, the *Wiener* Court suggested its view that, at least with respect to officers exercising "quasi-judicial" powers, the Constitution simply did not vest the President with a power of removal, even one that might be expressly or implicitly limited in appropriate circumstances by Congress. 357 U.S. at 352-53, 356. This language seems squarely at odds with a long line of authority, beginning with *In re Hennen*, 38 U.S. (13 Pet.) 230 (1839), and unchallenged even by *Humphrey's Executor*, which was careful to limit its decision to the question whether the Constitution vested in the President an "illimitable" power of removal. *Humphrey's Executor*, 295 U.S. at 629. We are unwilling to suppose that that line of authority has been overruled by the language in *Wiener*.

These cases reflect considerable shifts over the course of time, not only in the Supreme Court's resolutions of particular issues relating to the removal power, but more importantly in the constitutional premises underlying those resolutions. It is not clear, moreover, that these shifts are at an end. Justice Sutherland's decision in Humphrey's Executor, handed down the same day as A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), is stamped with some of the political science preconceptions characteristic of its era and not of the present day — if not stamped as well, as President Roosevelt thought, with hostility towards the architect of the New Deal.[27] It is not as obvious today as it seemed in the 1930s that there can be such things as genuinely "independent" regulatory agencies, bodies of impartial experts whose independence from the President does not entail correspondingly greater dependence upon the committees of Congress to which they are then immediately accountable; or, indeed, that the decisions of such agencies so clearly involve scientific judgment rather than political choice that it is even theoretically desirable to insulate them from the democratic process. Moreover, "quasi-legislative" and "quasi-judicial" functions can no longer be regarded as extraordinary or even unusual activities of executive agencies. Finally, the expansion of due process protections, see, e.g., Goldberg v. Kelly, 397 U.S. 254 (1970), statutorily prescribed procedures for both rulemaking and adjudication, see 5 U.S.C. §§ 553-559 (1982), and an elaborate system of judicial review, see 5 U.S.C. §§ 701-706 (1982), have provided in more targeted fashion some of the protection against political intervention, when it is inappropriate, which Humphrey's Executor sought to provide wholesale. It has in any event always been difficult to reconcile *Humphrey's Executor*'s "headless fourth branch" with a constitutional text and tradition establishing three branches of government — assuming, as the rationale though not the narrow holding of *Humphrey's Executor* requires, that the presidential removal for cause permitted under the statute upheld there did not include removal because of the appointee's failure to accept presidential instructions regarding matters of policy or statutory application delegated to him by Congress.

---

[27] Justice Jackson, who had been Roosevelt's attorney general, remarked:

> I really think the decision that made Roosevelt madder at the Court than any other decision was that damn little case of Humphrey's Executor v. United States. The President thought they went out of their way to spite him personally and they were giving him a different kind of deal than they were giving Taft.

E. Gerhart, America's Advocate: Robert H. Jackson 99 (1958).

Some knowledgeable observers, *see, e.g.*, Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 633-40 (1984), think that abandonment of the *Humphrey's Executor* analysis has been presaged by the Supreme Court's 1983 decision in *INS v. Chadha*, 462 U.S. at 919, which declared invalid the legislative veto of agency action characterized in the majority and one of the dissenting opinions as "quasi-legislative," *see id.* at 953 n.16 (majority); *id.* at 989 (White, J., dissenting), and in the concurrence as "judicial in nature," *see id.* at 966 n.10 (Powell, J., concurring). *See also Process Gas Consumers Group v. Consumer Energy Council of America*, 463 U.S. 1216 (1983), *aff'g mem. Consumers Union of United States, Inc. v. FTC*, 691 F.2d 575 (D.C. Cir. 1982) (en banc) (per curiam) (applying the holding of *Chadha* to legislative veto of rulemaking by an "independent" regulatory agency). Assuredly some of the language of the majority opinion in *Chadha* does not lie comfortably beside the central revelation of *Humphrey's Executor* that an officer such as a Federal Trade Commissioner "occupies no place in the executive department," and that an agency which exercises only "quasi-legislative or quasi-judicial powers" is "an agency of the legislative or judicial departments of the government," 295 U.S. at 628.[28]

---

[28] *See, e.g.*, the following:

> To be sure, some administrative agency action — rulemaking, for example — may resemble "lawmaking." . . . This Court has referred to agency activity as being "quasi-legislative" in character. *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935). Clearly, however, "[i]n the

(cont'd)

The Supreme Court's signals are not sufficiently clear, however, to justify our disregarding the rationale of Humphrey's Executor, and we view our present task as one of placing the facts before us into the framework established by Humphrey's Executor and by the holdings of earlier cases (including Myers) which Humphrey's Executor did not purport to overrule. In approaching that task, it becomes apparent at the outset that the present case falls neatly between the two stools of Myers and Humphrey's Executor. The Comptroller General is neither a "purely executive officer[ ]" whom Myers (as reinterpreted by Humphrey's Executor, see 295 U.S. at 627-28) requires to be subject to discretionary presidential removal; nor an officer such as that said to be involved in Humphrey's Executor, who "occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President," id. at 628. Rather, his status, insofar as the removal powers of the President are concerned, falls precisely within the no-man's land described in the last substantive paragraph of the Humphrey's Executor opinion:

> To the extent that, between the decision in the Myers case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise.

Id. at 632.

> framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952). See Buckley v. Valeo, 424 U.S., at 123. When the Attorney General performs his duties pursuant to § 244, he does not exercise "legislative" power. . . . It is clear . . . that the Attorney General acts in his presumptively Art. II capacity when he administers the Immigration and Nationality Act. Executive action under legislatively delegated authority that might resemble "legislative" action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require. . . . Congress' authority to delegate portions of its power to administrative agencies provides no support for the argument that Congress can constitutionally control administration of the laws by way of a congressional veto.

462 U.S. at 953-54 n.16.

It is unquestionable that some of the Comptroller General's powers — indeed, we will posit for purposes of the present decision, *all* except those at issue here — consist of (in the words of *Humphrey's Executor*) "specified duties as a legislative . . . aid," in the performance of which he "cannot in any proper sense be characterized as an arm or an eye of the executive." *Id.* at 628.[29] The Comptroller General's powers under the automatic deficit reduction process, however, do not come within that category. Under subsection 251(b)(1), the Comptroller General must specify levels of anticipated revenue and expenditure that determine the gross amount which must be sequestered; and he must specify which particular budget items are required to be reduced by the various provisions of the Act (which are not in all respects clear), and in what particular amounts. The first of these specifications requires the exercise of substantial judgment concerning present and future facts that affect the application of the law — the sort of power normally conferred upon the executive officer charged with implementing a statute. The second specification requires an interpretion of the law enacted by Congress, similarly a power normally committed initially to the Executive under the Constitution's prescription that he "take Care that the Laws be faithfully executed." Art. II, § 3. *And both of these specifications by the Comptroller General are, by the present law, made binding upon the President in the latter's application of the law.* Act § 252(a)(3). Indeed, the Comptroller General is explicitly directed to report to Congress on the extent to which the President follows his instructions. Act § 253. In our view, these cannot be regarded as anything but executive powers in the constitutional sense.

---

[29] *See, e.g.,* 2 U.S.C. § 686 (1982) (Comptroller General shall report unlawful impoundment of funds to both Houses of Congress); 2 U.S.C. § 687 (1982) (Comptroller General may sue the United States to force obligation of unlawfully impounded funds); 31 U.S.C. § 712(2) (1982) (Comptroller General shall estimate cost of compliance with expenditure restrictions in appropriations bills, report to Congress and make recommendations); 31 U.S.C. § 712(3) (1982) (Comptroller General shall analyze the efficiency of executive-agency expenditures of interest to Congress); 31 U.S.C. § 712(4) (1982) (Comptroller General shall make investigations at the request of either House or an appropriate committee thereof); 31 U.S.C. § 712(5) (1982) (Comptroller General shall give assistance and information to appropriate congressional committees); 31 U.S.C. § 716 (1982) (Comptroller General may sue heads of agencies to obtain audit information); 31 U.S.C. § 717(b) (1982) (Comptroller General shall evaluate the results of government activities at the request of either House of Congress or appropriate committees thereof); 31 U.S.C. § 717(c)-(d) (1982) (Comptroller General shall assist Congress and congressional committees in developing methods for the assessment of the results of governmental activities); 31 U.S.C. § 719 (1982) (Comptroller General shall make various reports to Congress and congressional committees).

The special relationship between the Comptroller General and Congress that is expressed in these statutes makes natural the frequent description of the Comptroller General and the General Accounting Office as "part of" or "an agency of" the legislative branch. *See, e.g., Bowsher v. Merck & Co.,* 460 U.S. 824, 844 (1983); *McDonnell Douglas Corp. v. United States,* 754 F.2d 365, 368 (Fed. Cir. 1985); *United States v. McDonnell Douglas Corp. v. United States,* 751 F.2d 220, 224 (8th Cir. 1984); *Delta Data Sys. Corp. v. Webster,* 744 F.2d 197, 201 n.1 (D.C. Cir. 1984); *but cf., e.g., Lear Siegler, Inc. v. Lehman,* No. CV 85-1125-KN (C.D. Cal. Nov. 21, 1985); *Ameron, Inc. v. United States Army Corps of Eng'rs,* 607 F. Supp. 962 (D.N.J. 1985), *appeal filed,* No. 85-5226 (3d Cir.); *United States ex rel. Brookfield Constr. Co. v. Stewart,* 234 F. Supp. 94, 99-100 (D.D.C.), *aff'd,* 339 F.2d 753 (D.C. Cir. 1964) (per curiam). We need not and do not decide, however, whether such characterizations are accurate.

We are, therefore, in the no-man's land described by *Humphrey's Executor*, confronting an officer whose powers are neither exclusively executive nor exclusively nonexecutive. The Comptroller General argues, in essence, that this territory should be awarded to the "exclusively nonexecutive" side — that so long as the officer in question exercises some, or at least a substantial number of, nonexecutive powers, the constitutional restrictions upon the manner of his removal are the same as those applicable in *Humphrey's Executor*. We cannot accept that view.

What has been at issue in the congressional-executive dispute over the power of removal that began in the First Congress is not control over the officer but, ultimately, control over the governmental functions that he performs. And the object of all the Supreme Court's opinions on the subject has been to assure, in the words of Justice Story quoted in *Humphrey's Executor*, "that neither of the departments in reference to each other '[shall] possess, directly or indirectly, an overruling influence in the administration of their respective powers.'" 295 U.S. at 630 (quoting J. Story, *Commentaries on the Constitution of the United States* § 530 (4th ed. 1873)). The pursuit of that principle becomes a foolish game if all that is necessary for Congress to acquire an "overruling influence" over the administration of a constitutional executive power, no matter how significant it may be, is to confer that power upon an official who exercises one or more nonexecutive powers as well. Nor are we disposed to resolve this matter on the basis of whether there is an "adequate" admixture of nonexecutive powers, or whether nonexecutive powers "predominate"; those are neither judicially manageable nor congressionally knowable standards. Thus, under the Comptroller General's theory the heads of most major executive agencies, since they exercise some quasi-legislative or quasi-judicial powers, would currently qualify for Humphrey's Executor treatment — and it is impossible to imagine any executive officer who could not be made to qualify by sagacious congressional conferral of nonexecutive powers in the future. On the Comptroller General's theory, not only he but also the Director of the OMB could be subjected to congressional removal.

Having concluded that we are in the middle ground, and that the middle ground cannot uniformly be accorded Humphrey's Executor treatment, we must decide precisely what treatment the present facts demand. At this point another distinction between Humphrey's Executor and the present case becomes relevant: the former upheld a statute that imposed no more than a partial restriction upon the presidential power of removal — removal without cause was prohibited, but presidential removal for "inefficiency, neglect of duty, or malfeasance in office" was allowed. The statute governing removal of the Comptroller General, by contrast, eliminates all presidential power of removal, and — much beyond that — confers the power of removal upon Congress. The enormous difference between the two, insofar as impact upon the balance of powers is concerned, is apparent. As was observed by the Court in Myers, which, unlike Humphrey's Executor, did involve the assertion of removal power by the Congress:

> The Court . . . has recognized in the Perkins case that Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal. But the Court never has held, nor reasonably could hold . . . , that the excepting clause enables Congress to draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power.

272 U.S. at 161. It remains true that the Supreme Court has never sanctioned congressional assertion of such a power. We think it at least questionable whether the power would be approved even with respect to officers of the United States who exercise only "quasi-legislative" powers in the Humphrey's Executor sense — since it would dramatically reduce the value of the right to appoint such officers which the Constitution has assured to the Executive or to the Courts of Law, a right that the Supreme Court has regarded as an important element of the balance of powers, prompted by the founders' often expressed fear "that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." Buckley v. Valeo, 424 U.S. at 129. We are confident, however, that congressional removal power cannot be approved with regard to an officer who actually participates in the execution of the laws. Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey. Giving such power over executive functions to Congress violates the fundamental principle expressed by Montesquieu upon which the theory of separated powers rests: "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehension may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." Montesquieu, The Spirit of Laws, vol. I, bk. XI, ch. 6, at 152 (London 1823). See also The Federalist No. 48, at 327 (J. Madison) (P. Ford ed. 1898) ("[N]one of [the branches] ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers.").

The Comptroller General argues, however, that a congressional removal power limited to cause (which is what we have here) no more enables Congress to control executive powers than did the presidential removal power for cause, which was retained by the statute at issue in Humphrey's Executor, enable the President to control the exclusively "quasi-legislative" and "quasi-judicial" powers of the Federal Trade

Commission. It is not clear, to begin with, that a "quasi-legislative" power is the same as a legislative power in the constitutional sense, so that the intrusion upon the Executive here is parallel to the intrusion upon the Congress there.[30] Assuming, however, that it is, there are several answers to the Comptroller General's objection. Humphrey's Executor neither faced nor considered the question whether the limitations imposed by the doctrine of separation of powers on the scope of executive authority over the removal of nonexecutive officers are precisely equal to the analogous limitations on the scope of congressional authority over the removal of executive officers. Parity is no more to be expected there than it is with respect to the scope of the power to appoint, as to which the Constitution grants only a subordinate role to the Congress. It is the starting point of all judicial analysis in this area, see, e.g., In re Hennen, 38 U.S. (13 Pet.) 230 (1839), that the President's power to remove, however much it may be restricted, derives from the constitutional grant of his power to appoint; and we think the permissible impact of that power to remove upon an officer's independence, in comparison to the permissible impact of any such congressional power, may properly reflect the greater strength of that pedigree.[31] Moreover, insofar as effect upon balance of powers is concerned, congressional power to remove is much more potent, since the Executive has no means of retaliation that may dissuade Congress from exercising it — other than leaving the office vacant, thereby impairing the Executive's own functions. Congress, on the other hand, has many ways to make the President think long and hard before he makes a "for cause" removal that Congress disapproves, ranging from budget constriction to refusal to confirm a successor.

---

[30] Justice Jackson aptly characterized the ambiguity of the "quasi-legislative" and "quasi-judicial" categories enshrined in constitutional jurisprudence by Humphrey's Executor as follows:

> Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying "quasi" is implicit with confession that all recognized classifications have broken down, and "quasi" is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.

FTC v. Ruberoid Co., 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting).

[31] Of course, the Constitution vests Congress with the power to bring and try impeachments of all officers of the United States. We think it apparent, however, that this very limited power of removal, which may be exercised only through the trial and conviction of an officer for "Treason, Bribery, or other high Crimes and Misdemeanors," Art. II, § 4, simply cannot be compared to the congressional removal power at issue in this case in its effect upon the independence of executive officers. Moreover, the (cont'd)

It seems to us entirely clear under the recent landmark decision in INS v. Chadha, 462 U.S. 919 (1983), that if the present statute had not inserted the Comptroller General between the President and the report of the Directors of the CBO and the OMB, and if the determinations to be made under the Act by the Comptroller General had been assigned instead to the President himself, Congress could not constitutionally provide for legislative veto of those determinations. It is also unthinkable that Congress could constitutionally provide for veto of those determinations by an officer removable by Congress — the Comptroller General, for example. It seems to us no more constitutionally permissible to achieve the same result *ex ante* instead of *ex post*, prescribing in advance the exercise of executive power, instead of invalidating its exercise.

We hold, therefore, that since the powers conferred upon the Comptroller General as part of the automatic deficit reduction process are executive powers, which cannot constitutionally be exercised by an officer removable by Congress, those powers cannot be exercised and therefore the automatic deficit reduction process to which they are central cannot be implemented. As earlier noted, we need not deliberate concerning the effect of this invalidation upon other portions of the Act, since the Act itself provides the answer: replacement of the automatic deficit reduction process with the fallback deficit reduction process, and preservation of the remainder of the Act intact. The Act

---

existence of such a carefully limited congressional removal power undermines rather than supports the proposition that Congress may attempt to assert an additional power of removal.

also requires, § 274(e), that we stay the order implementing our judgment pending the outcome of any appeal.

* * * * *

We do not minimize the effect of our invalidation of one small section of the Act upon the entire statutory scheme. Our holding today eliminates the automatic deficit reduction process, and gives effect to the prescriptions of the Directors of the OMB and CBO only to the extent that they are adopted by joint resolution, i.e., legislation, under the fallback deficit reduction process. It may seem odd that this curtailment of such an important and hard-fought legislative program should hinge upon the relative technicality of authority over the Comptroller General's removal — particularly when we have rejected the more intuitive "excessive delegation" arguments that were the focus of the attacks upon the legislation by its opponents on the floor of Congress and by the plaintiffs here. But the balance of separated powers established by the Constitution consists precisely of a series of technical provisions that are more important to liberty than superficially appears, and whose observance cannot be approved or rejected by the courts as the times seem to require. Both of these points have been eloquently expressed by a respected scholar in course of discussing application of the Constitution's guarantee against removal of judges to officials appointed under Article I but in fact exercising Article III judicial powers:

> Mid-twentieth century Americans have become accustomed to assuming that the central constitutional method of protecting individual freedoms from being overridden by government ukase is to prevent governmental intrusions into certain defined zones of individual conduct. Thus, we quite rightly applaud actions enshrining constitutional rights to freedom of speech, religion, privacy, and equal protection.
>
> Those who wrote the Constitution, however, did not employ this technique. Rather, they emphasized the virtues of limiting governmental power and then dividing the remaining power among autonomous government compartments. Hence, most of our constitutional rights of individual liberty or autonomy are stated in constitutional amendments.

> The body of the Constitution as originally written is principally an exercise in applying the concepts of federalism and separation of powers to the new American nation. The framers were not disciples of John Stuart Mill, who had not yet been born, but of Montesquieu, whom they had read carefully.
>
> . . . .
>
> . . . [P]art of the value of a clearly expressed, constitutional separation-of-powers principle often inheres in its apparent rigidity or inability to adapt easily to different solutions. As a nation, one question we must face every day is how far judges and legislators should be separated. Many rational answers to that question are possible. The United States has chosen, by the device of a written constitution, and on the basis of specific historical experience, to resolve that question at one time and in one way for almost all cases. To respect that judgment promotes stability, predictability and consistency, and avoids constant re-examination of troublesome policy issues underlying the question.

Krattenmaker, Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional, 70 Geo. L.J. 297, 301-02, 311 (1981).

We observe, moreover, that although we have rejected the argument based upon the doctrine of unconstitutional delegation, the more technical separation-of-powers requirements we have relied upon may serve to further the policy of that doctrine more effectively than the doctrine itself. Unconstitutional delegation has been invoked by the federal courts to invalidate legislation only twice in almost 200 years, and the possibility of such invalidation, at least in modern times, is not a credible deterrent against the human propensity to leave difficult questions to somebody else. The instances are probably innumerable, however, in which Congress has chosen to decide a difficult issue itself because of its reluctance to leave the decision — as our holding today reaffirms it must — to an officer within the control of the executive branch.

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES *v.* SYNAR, MEMBER OF CONGRESS, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 85–1377. Argued April 23, 1986—Decided July 7, 1986*

In order to eliminate the federal budget deficit, Congress enacted the Balanced Budget and Emergency Deficit Control Act of 1985 (Act), popularly known as the "Gramm-Rudman-Hollings Act," which sets a maximum deficit amount for federal spending for each of the fiscal years 1986 through 1991 (progressively reducing the deficit amount to zero in 1991). If in any fiscal year the budget deficit exceeds the prescribed maximum by more than a specified sum, the Act requires basically across-the-board cuts in federal spending to reach the targeted deficit level. These reductions are accomplished under the "reporting provisions" spelled out in § 251 of the Act, which requires the Directors of the Office of Management and Budget (OMB) and the Congressional Budget Office (CBO) to submit their deficit estimates and program-by-program budget reduction calculations to the Comptroller General who, after reviewing the Directors' joint report, then reports his conclusions to the President. The President in turn must issue a "sequestration" order mandating the spending reductions specified by the Comptroller General, and the sequestration order becomes effective unless, within a specified time, Congress legislates reductions to obviate the need for the sequestration order. The Act also contains in § 274(f) a "fallback" deficit reduction process (eliminating the Comptroller General's participation) to take effect if § 251's reporting provisions are invalidated. In consolidated

---

*Together with No. 85–1378, *United States Senate* v. *Synar, Member of Congress, et al.*, and No. 85–1379, *O'Neill, Speaker of the United States House of Representatives, et al.* v. *Synar, Member of Congress, et al.*, also on appeal from the same court.

actions in the Federal District Court, individual Congressmen and the National Treasury Employees Union (Union) (who, along with one of the Union's members, are appellees here) challenged the Act's constitutionality. The court held, *inter alia*, that the Comptroller General's role in exercising executive functions under the Act's deficit reduction process violated the constitutionally imposed doctrine of separation of powers because the Comptroller General is removable only by a congressional Joint Resolution or by impeachment, and Congress may not retain the power of removal over an officer performing executive powers.

Held:

1. The fact that members of the Union, one of whom is an appellee here, will sustain injury because the Act suspends certain scheduled cost-of-living benefit increases to the members, is sufficient to create standing under a provision of the Act and Article III to challenge the Act's constitutionality. Therefore, the standing issue as to the Union itself or Members of Congress need not be considered. Pp. 5–6.

2. The powers vested in the Comptroller General under § 251 violate the Constitution's command that Congress play no direct role in the execution of the laws. Pp. 6–18.

(a) Under the constitutional principle of separation of powers, Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment. To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control of the execution of the laws. The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess. Cf. *INS* v. *Chadha*, 462 U. S. 919. Pp. 6–11.

(b) There is no merit to the contention that the Comptroller General performs his duties independently and is not subservient to Congress. Although nominated by the President and confirmed by the Senate, the Comptroller General is removable only at the initiative of Congress. Under controlling statutes, he may be removed not only by impeachment but also by Joint Resolution of Congress "at any time" for specified causes, including "inefficiency," "neglect of duty," and "malfeasance." The quoted terms, as interpreted by Congress, could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will. Moreover, the political realities do not reveal that the Comptroller General is free from Congress' influence. He heads the General Accounting Office, which under pertinent statutes is "an instrumentality of the United States Government independent of the executive departments," and Congress has consistently viewed the Comptroller General as an officer of the Legislative Branch. Over the years, the Comptrollers General have also viewed themselves as part of the Legislative Branch. Thus, because Congress has retained removal authority over the Comptroller General, he may not be entrusted with executive powers. Pp. 11–16.

(c) Under § 251 of the Act, the Comptroller General has been improperly assigned executive powers. Although he is to have "due regard" for the estimates and reductions contained in the joint report of the Directors of the CBO and the OMB, the Act clearly contemplates that in preparing his report the Comptroller General will exercise his independent judgment and evaluation with respect to those estimates and will make decisions of the kind that are made by officers charged with executing a statute. The Act's provisions give him, not the President, the ultimate authority in determining what budget cuts are to be made. By placing the responsibility for execution of the Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the Act's execution and has unconstitutionally intruded into the executive function. Pp. 16–18.

3. It is not necessary to consider whether the appropriate remedy is to nullify the 1921 statutory provisions that authorize Congress to remove the Comptroller General, rather than to invalidate § 251 of the Act. In § 274(f), Congress has explicitly provided "fallback" provisions that take effect if any of the reporting procedures described in § 251 are invalidated. Assuming that the question of the appropriate remedy must be resolved on the basis of congressional intent, the intent appears to have been for § 274(f) to be given effect as written. Pp. 18–19.

626 F. Supp. 1374, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined. WHITE and BLACKMUN, JJ., filed dissenting opinions.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 85–1377, 85–1378 AND 85–1379

CHARLES A. BOWSHER, COMPTROLLER GENERAL
OF THE UNITED STATES, APPELLANT
85–1377 v.
MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

UNITED STATES SENATE, APPELLANT
85–1378 v.
MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED
STATES HOUSE OF REPRESENTATIVES,
ET AL., APPELLANTS
85–1379 v.
MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[July 7, 1986]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented by these appeals is whether the assignment by Congress to the Comptroller General of the United States of certain functions under the Balanced Budget and Emergency Deficit Control Act of 1985 violates the doctrine of separation of powers.

I

A

On December 12, 1985, the President signed into law the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, 99 Stat. 1038, 2 U. S. C. A. § 901 *et seq.* (Supp. 1986), popularly known as the "Gramm-Rudman-Hollings Act." The purpose of the Act is to eliminate the federal budget deficit. To that end, the Act sets a "maximum deficit amount" for federal spending for each of fiscal years 1986 through 1991. The size of that maximum deficit amount progressively reduces to zero in fiscal year 1991. If in any fiscal year the federal budget deficit exceeds the maximum deficit amount by more than a specified sum, the Act requires across-the-board cuts in federal spending to reach the targeted deficit level, with half of the cuts made to defense programs and the other half made to non-defense programs. The Act exempts certain priority programs from these cuts. § 255.

These "automatic" reductions are accomplished through a rather complicated procedure, spelled out in § 251, the so-called "reporting provisions" of the Act. Each year, the Directors of the Office of Management and Budget (OMB) and the Congressional Budget Office (CBO) independently estimate the amount of the federal budget deficit for the upcoming fiscal year. If that deficit exceeds the maximum targeted deficit amount for that fiscal year by more than a specified amount, the Directors of OMB and CBO independently calculate, on a program-by-program basis, the budget reductions necessary to ensure that the deficit does not exceed the maximum deficit amount. The Act then requires the Directors to report jointly their deficit estimates and budget reduction calculations to the Comptroller General.

The Comptroller General, after reviewing the Directors' reports, then reports his conclusions to the President. § 251(b). The President in turn must issue a "sequestration" order mandating the spending reductions specified by the

Comptroller General. § 252. There follows a period during which Congress may by legislation reduce spending to obviate, in whole or in part, the need for the sequestration order. If such reductions are not enacted, the sequestration order becomes effective and the spending reductions included in that order are made.

Anticipating constitutional challenge to these procedures, the Act also contains a "fallback" deficit reduction process to take effect "[i]n the event that any of the reporting procedures described in section 251 are invalidated." § 274(f). Under these provisions, the report prepared by the Directors of OMB and the CBO is submitted directly to a specially-created Temporary Joint Committee on Deficit Reduction, which must report in five days to both Houses a joint resolution setting forth the content of the Directors' report. Congress then must vote on the resolution under special rules, which render amendments out of order. If the resolution is passed and signed by the President, it then serves as the basis for a Presidential sequestration order.

B

Within hours of the President's signing of the Act,[1] Congressman Synar, who had voted against the Act, filed a complaint seeking declaratory relief that the Act was unconstitutional. Eleven other Members later joined Congressman Synar's suit. A virtually identical lawsuit was also filed by the National Treasury Employees Union. The Union alleged that its members had been injured as a result of the Act's automatic spending reduction provisions, which have suspended certain cost-of-living benefit increases to the Union's members.[2]

---

[1] In his signing statement, the President expressed his view that the Act was constitutionally defective because of the Comptroller General's ability to exercise supervisory authority over the President. Statement on Signing H. J. Res. 372 Into Law, 21 Weekly Comp. of Pres. Doc. 1491 (1985).

[2] An individual member of the Union was later added as a plaintiff. See 475 U. S. —— (1986).

A three-judge District Court, appointed pursuant to 2 U. S. C. A. § 922(a)(5) (Supp. 1986), invalidated the reporting provisions. *Synar* v. *United States*, 626 F. Supp. 1374 (DC 1986) (Scalia, Johnson, Gasch, JJ.). The District Court concluded that the Union had standing to challenge the Act since the members of the Union had suffered actual injury by suspension of certain benefit increases. The District Court also concluded that Congressman Synar and his fellow Members had standing under the so-called "Congressional standing" doctrine. See *Barnes* v. *Kline*, 245 U. S. App. D. C. 1, 21, 759 F. 2d 21, 41 (1985), cert. granted *sub nom. Burke* v. *Barnes*, 475 U. S. —— (1986).

The District Court next rejected appellees' challenge that the Act violated the delegation doctrine. The court expressed no doubt that the Act delegated broad authority, but delegation of similarly broad authority has been upheld in past cases. The District Court observed that in *Yakus* v. *United States*, 321 U. S. 414, 420 (1944), this Court upheld a statute that delegated to an unelected "Price Administrator" the power "to promulgate regulations fixing prices of commodities." Moreover, in the District Court's view, the Act adequately confined the exercise of administrative discretion. The District Court concluded that "the totality of the Act's standards, definitions, context, and reference to past administrative practice provides an adequate 'intelligible principle' to guide and confine administrative decisionmaking." 626 F. Supp., at 1389.

Although the District Court concluded that the Act survived a delegation doctrine challenge, it held that the role of the Comptroller General in the deficit reduction process violated the constitutionally imposed separation of powers. The court first explained that the Comptroller General exercises executive functions under the Act. However, the Comptroller General, while appointed by the President with the advice and consent of the Senate, is removable not by the President but only by a joint resolution of Congress or by impeachment. The District Court reasoned that this arrangement could not be sustained under this Court's decisions in *Myers* v. *United States*, 272 U. S. 52 (1926), and *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935). Under the separation of powers established by the Framers of the Constitution, the court concluded, Congress may not retain the power of removal over an officer performing executive functions. The congressional removal power created a "here-and-now subservience" of the Comptroller General to Congress. 626 F. Supp., at 1392. The District Court therefore held that

> "since the powers conferred upon the Comptroller General as part of the automatic deficit reduction process are executive powers, which cannot constitutionally be exercised by an officer removable by Congress, those powers cannot be exercised and therefore the automatic deficit reduction process to which they are are central cannot be implemented." *Id.*, at 1403.

Appeals were taken directly to this Court pursuant to § 274(b) of the Act. We noted probable jurisdiction and expedited consideration of the appeals. 475 U. S. —— (1986). We affirm.

II

A threshold issue is whether the Members of Congress, members of the National Treasury Employees Union, or the Union itself have standing to challenge the constitutionality of the Act in question. It is clear that members of the Union, one of whom is an appellee here, will sustain injury by not receiving a scheduled increase in benefits. See § 252(a)(6)(C)(i); 626 F. Supp., at 1381. This is sufficient to confer standing under § 274(a)(2) and Article III. We therefore need not consider the standing issue as to the Union or Members of Congress. See *Secretary of Interior* v. *California*, 464 U. S. 312, 319, n. 3 (1984). Cf. *Automobile*

Workers v. *Brock*, 477 U. S. —— (1986); *Barnes* v. *Kline*, *supra*. Accordingly, we turn to the merits of the case.

III

We noted recently that "[t]he Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." *INS* v. *Chadha*, 462 U. S. 919, 951 (1983). The declared purpose of separating and dividing the powers of government, of course, was to "diffus[e] power the better to secure liberty." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring). Justice Jackson's words echo the famous warning of Montesquieu, quoted by James Madison in The Federalist No. 47, that "'there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates' . . . ." The Federalist No. 47, p. 325 (J. Cooke ed. 1961).

Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty. The Framers provided a vigorous legislative branch and a separate and wholly independent executive branch, with each branch responsible ultimately to the people. The Framers also provided for a judicial branch equally independent with "[t]he judicial Power . . . extend[ing] to all Cases, in Law and Equity, arising under this Constitution, and the Laws of the United States." Art. III, § 2.

Other, more subtle, examples of separated powers are evident as well. Unlike parliamentary systems such as that of Great Britain, no person who is an officer of the United States may serve as a Member of the Congress. Art. I, § 6. Moreover, unlike parliamentary systems, the President, under Article II, is responsible not to the Congress but to the people, subject only to impeachment proceedings which are exercised by the two Houses as representatives of the people. Art. II, § 4. And even in the impeachment of a President the presiding officer of the ultimate tribunal is not a member of the legislative branch, but the Chief Justice of the United States. Art I, § 3.

That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power.

The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts. The President appoints "Officers of the United States" with the "Advice and Consent of the Senate . . . ." Article II, § 2. Once the appointment has been made and confirmed, however, the Constitution explicitly provides for removal of Officers of the United States by Congress only upon impeachment by the House of Representatives and conviction by the Senate. An impeachment by the House and trial by the Senate can rest only on "Treason, Bribery or other high Crimes and Misdemeanors." Article II, § 4. A direct congressional rôle in the removal of officers charged with the execution of the laws beyond this limited one is inconsistent with separation of powers.

This was made clear in debate in the First Congress in 1789. When Congress considered an amendment to a bill establishing the Department of Foreign Affairs, the debate centered around whether the Congress "should recognize and declare the power of the President under the Constitution to remove the Secretary of Foreign Affairs without the advice and consent of the Senate." *Myers*, *supra*, at 114. James Madison urged rejection of a congressional role in the removal of Executive Branch officers, other than by impeachment, saying in debate:

> "Perhaps there was no argument urged with more success, or more plausibly grounded against the Constitution, under which we are now deliberating, than that

> founded on the mingling of the Executive and Legislative branches of the Government in one body. It has been objected, that the Senate have too much of the Executive power even, by having a control over the President in the appointment to office. Now, shall we extend this connexion between the Legislative and Executive departments, which will strengthen the objection, and diminish the responsibility we have in the head of the Executive?" 1 Annals of Cong. 380.

Madison's position ultimately prevailed, and a congressional role in the removal process was rejected. This "Decision of 1789" provides "contemporaneous and weighty evidence" of the Constitution's meaning since many of the Members of the first Congress "had taken part in framing that instrument." *Marsh* v. *Chambers*, 463 U. S. 783, 790 (1983).[3]

This Court first directly addressed this issue in *Myers* v. *United States*, 272 U. S. 52 (1925). At issue in *Myers* was a statute providing that certain postmasters could be removed only "by and with the advice and consent of the Senate." The President removed one such postmaster without Senate approval, and a lawsuit ensued. Chief Justice Taft, writing for the Court, declared the statute unconstitutional on the ground that for Congress to "draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power . . . would be . . . to infringe the constitutional principle of the separation of governmental powers." *Id.*, at 161.

---

[3] The First Congress included 20 members who had been delegates to the Philadelphia Convention:

IN THE SENATE

Richard Bassett (Delaware)
Pierce Butler (South Carolina)
Oliver Ellsworth (Connecticut)
William Few (Georgia)
William Samuel Johnson (Connecticut)
Rufus King (New York)
John Langdon (New Hampshire)
Robert Morris (Pennsylvania)
William Paterson (New Jersey)
George Read (Delaware)
Caleb Strong (Massachusetts)

IN THE HOUSE

Abraham Baldwin (Georgia)
Daniel Carroll (Maryland)
George Clymer (Pennsylvania)
Thomas FitzSimons (Pennsylvania)
Elbridge Gerry (Massachusetts)
Nicholas Gilman (New Hampshire)
James Madison (Virginia)
Roger Sherman (Connecticut)
Hugh Williamson (North Carolina)

A decade later, in *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), relied upon heavily by appellants, a Federal Trade Commissioner who had been removed by the President sought back pay. *Humphrey's Executor* involved an issue not presented either in the *Myers* case or in this case—*i. e.*, the power of Congress to limit the President's powers of removal of a Federal Trade Commissioner. 295 U. S., at 630.[4] The relevant statute permitted removal "by the President," but only "for inefficiency, neglect of duty, or malfeasance in office." Justice Sutherland, speaking for the Court, upheld the statute, holding that "illimitable power of removal is not possessed by the President [with respect to Federal Trade Commissioners]." 295 U. S., at 628–629. The Court distinguished *Myers*, reaffirming its holding that congressional participation in the removal of executive officers is unconstitutional. Justice Sutherland's opinion for the Court also underscored the crucial role of separated powers in our system:

---

[4] Appellants therefore are wide of the mark in arguing that an affirmance in this case requires casting doubt on the status of "independent" agencies because no issues involving such agencies are presented here. The statutes establishing independent agencies typically specify either that the agency members are removable by the President for specified causes, see, *e. g.*, 15 U. S. C. § 41 (members of the Federal Trade Commission may be removed by the President "for inefficiency, neglect of duty, or malfeasance in office"), or else do not specify a removal procedure, see, *e. g.*, 2 U. S. C. § 437c (Federal Election Commission). This case involves nothing like these statutes, but rather a statute that provides for direct Congressional involvement over the decision to remove the Comptroller General. Appellants have referred us to no independent agency whose members are removable by the Congress for certain causes short of impeachable offenses, as is the Comptroller General, see Part IV, *infra*.

> "The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality." 295 U. S., at 629–630.

The Court reached a similar result in *Weiner* v. *United States*, 357 U. S. 349 (1958), concluding that, under *Humphrey's Executor*, the President did not have unrestrained removal authority over a member of the War Crimes Commission.

In light of these precedents, we conclude that Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment. To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws. As the District Court observed, "Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." 626 F. Supp., at 1401. The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.

Our decision in *INS* v. *Chadha*, 462 U. S. 919 (1983), supports this conclusion. In *Chadha*, we struck down a one house "legislative veto" provision by which each House of Congress retained the power to reverse a decision Congress had expressly authorized the Attorney General to make:

> "Disagreement with the Attorney General's decision on Chadha's deportation—that is, Congress' decision to deport Chadha—no less than Congress' original choice to delegate to the Attorney General the authority to make

> that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." *Id.*, at 954–955.

To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto. Congress could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Congress. This kind of congressional control over the execution of the laws, *Chadha* makes clear, is constitutionally impermissible.

The dangers of congressional usurpation of Executive Branch functions have long been recognized. "[T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." *Buckley* v. *Valeo*, 424 U. S. 1, 129 (1976). Indeed, we also have observed only recently that "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *Chadha*, 462 U. S., at 951. With these principles in mind, we turn to consideration of whether the Comptroller General is controlled by Congress.

IV

Appellants urge that the Comptroller General performs his duties independently and is not subservient to Congress. We agree with the District Court that this contention does not bear close scrutiny.

The critical factor lies in the provisions of the statute defining the Comptroller General's office relating to removability.[5] Although the Comptroller General is nominated by the President from a list of three individuals recommended by the Speaker of the House of Representatives and the President pro tempore of the Senate, see 31 U. S. C. § 703(a)(2),[6] and confirmed by the Senate, he is removable only at the initiative of Congress. He may be removed not only by impeachment but also by Joint Resolution of Congress "at any time" resting on any one of the following bases:

> "(i) permanent disability;
> "(ii) inefficiency;
> "(iii) neglect of duty;
> "(iv) malfeasance; or
> "(v) a felony or conduct involving moral turpitude."
>
> 31 U. S. C. § 703(e)(1).[7]

This provision was included, as one Congressman explained in urging passage of the Act, because Congress "felt that [the Comptroller General] should be brought under the sole control of Congress, so that Congress at the moment when it found he was inefficient and was not carrying on the duties of his office as he should and as the Congress expected, could remove him without the long, tedious process of a trial by impeachment." 61 Cong. Rec. 1081 (1921).

---

[5] We reject appellants' argument that consideration of the effect of a removal provision is not "ripe" until that provision is actually used. As the District Court concluded, "it is the Comptroller General's presumed desire to avoid removal by pleasing Congress, which creates the here-and-now subservience to another branch that raises separation-of-powers problems." *Synar* v. *United States*, 626 F. Supp. 1374, 1392 (DC 1986). The Impeachment Clause of the Constitution can hardly be thought to be undermined because of non-use.

[6] Congress adopted this provision in 1980 because of "the special interest of both Houses in the choice of an individual whose primary function is to provide assistance to Congress." S. Rep. 96-570, 96th Cong., 2d Sess., 10 (1980).

[7] Although the President could veto such a joint resolution, the veto could be overridden by a two-thirds vote of both Houses of Congress. Thus, the Comptroller General could be removed in the face of Presidential opposition. Like the District Court, 626 F. Supp., at 1393 n. 21, we therefore read the removal provision as authorizing removal by Congress alone.

The removal provision was an important part of the legislative scheme, as a number of Congressmen recognized. Representative Hawley commented: "[H]e is our officer, in a measure, getting information for us . . . . If he does not do his work properly, we, as practically his employers, ought to be able to discharge him from office." 58 Cong. Rec. 7136 (1919). Representative Sisson observed that the removal provisions would give "[t]he Congress of the United States . . . absolute control of the man's destiny in office." 61 Cong. Rec. 987 (1921). The ultimate design was to "give the legislative branch of the Government control of the audit, not through the power of appointment, but through the power of removal." 58 Cong. Rec. 7211 (1919) (Rep. Taylor).

JUSTICE WHITE contends that "[t]he statute does not permit anyone to remove the Comptroller at will; removal is permitted only for specified cause, with the existence of cause to be determined by Congress following a hearing. Any removal under the statute would presumably be subject to post-termination judicial review to ensure that a hearing had in fact been held and the finding of cause for removal was not arbitrary." *Post*, at 12. That observation by the dissenter rests on at least two arguable premises: (a) that the enumeration of certain specified causes of removal excludes the possibility of removal for other causes, cf. *Shurtleff* v. *United States*, 189 U. S. 311, 315–316 (1903); and (b) that any removal would be subject to judicial review, a position that appellants were unwilling to endorse.[8]

Glossing over these difficulties, the dissent's assessment of the statute fails to recognize the breadth of the grounds for removal. The statute permits removal for "inefficiency," "neglect of duty," or "malfeasance." These terms are very broad and, as interpreted by Congress, could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will. The Constitutional Convention chose to permit impeachment of executive officers only for "Treason, Bribery, or other high Crimes and Misdemeanors." It rejected language that would have permitted impeachment for "maladministration," with Madison arguing that "[s]o vague a term will be equivalent to a tenure during pleasure of the Senate." 2 Farrand 550.

---

[8] The dissent relies on *Humphrey's Executor* as its only Court authority for this point, but the President did not assert that he had removed the Federal Trade Commissioner in compliance with one of the enumerated statutory causes for removal. See 295 U. S., at 612 (argument of Solicitor General Reed); see also 626 F. Supp., at 1398.

We need not decide whether that "inefficiency" or "malfeasance" are terms as broad as "maladministration" in order to reject the dissent's position that removing the Comptroller general requires "a feat of bipartisanship more difficult than that required to impeach and convict." *Post*, at 14 (WHITE, J., dissenting). Surely no one would seriously suggest that judicial independence would be strengthened by allowing removal of federal judges only by a joint resolution finding "inefficiency," "neglect of duty," or "malfeasance."

JUSTICE WHITE, however, assures us that "[r]ealistic consideration" of the "practical result of the removal provision," *post*, at 17, 15, reveals that the Comptroller General is unlikely to be removed by Congress. The separated powers of our government can not be permitted to turn on judicial assessment of whether an officer exercising executive power is on good terms with Congress. The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty. In constitutional terms, the removal powers over the Comptroller General's office dictate that he will be subservient to Congress.

This much said, we must also add that the dissent is simply in error to suggest that the political realities reveal that the Comptroller General is free from influence by Congress. The Comptroller General heads the General Accounting Office, "an instrumentality of the United States Government independent of the executive departments," 31 U. S. C. § 702(a), which was created by Congress in 1921 as part of the Budget and Accounting Act of 1921, 42 Stat. 23. Congress created the office because it believed that it "needed an officer, responsible to it alone, to check upon the application of public funds in accordance with appropriations." H. Mansfield, The Comptroller General: A Study in the Law and Practice of Financial Administration 65 (1939).

It is clear that Congress has consistently viewed the Comptroller General as an officer of the Legislative Branch. The Reorganization Acts of 1945 and 1949, for example, both stated that the Comptroller General and the GAO are "a part of the legislative branch of the Government." 59 Stat. 616; 63 Stat. 205. Similarly, in the Accounting and Auditing Act of 1950, Congress required the Comptroller General to conduct audits "as an agent of the Congress." 64 Stat. 835.

Over the years, the Comptrollers General have also viewed themselves as part of the Legislative Branch. In one of the early Annual Reports of Comptroller General, the official seal of his office was described as reflecting:

> "the independence of judgment to be exercised by the General Accounting Office, subject to the control of the legislative branch. . . . The combination represents an agency of the Congress independent of other authority auditing and checking the expenditures of the Government as required by law and subjecting any questions arising in that connection to quasi-judicial determination." GAO Ann. Rep. 5–6 (1924).

Later, Comptroller General Warren, who had been a member of Congress for 15 years before being appointed Comptroller General, testified that: "During most of my public life, . . . I have been a member of the legislative branch. Even now, although heading a great agency, it is an agency of the Congress, and *I am an agent of the Congress.*" To Provide for Reorganizing of Agencies of the Government: Hearings on

H. R. 3325 before the House Committee on Expenditures, 79th Cong., 1st Sess., 69 (1945) (emphasis added). And, in one conflict during Comptroller General McCarl's tenure, he asserted his independence of the Executive Branch, stating:

> "Congress . . . is . . . the only authority to which there lies an appeal from the decision of this office. . . .
>
> ". . . I may not accept the opinion of any official, inclusive of the Attorney General, as controlling my duty under the law." 2 Comp. Gen. 784, 786–787 (1923) (disregarding conclusion of the Attorney General, 33 Op. Atty. Gen. 476 (1923) with respect to interpretation of compensation statute).

Against this background, we see no escape from the conclusion that, because Congress had retained removal authority over the Comptroller General, he may not be entrusted with executive powers. The remaining question is whether the Comptroller General has been assigned such powers in the Balanced Budget and Emergency Deficit Control Act of 1985.

V

The primary responsibility of the Comptroller General under the instant Act is the preparation of a "report." This report must contain detailed estimates of projected federal revenues and expenditures. The report must also specify the reductions, if any, necessary to reduce the deficit to the target for the appropriate fiscal year. The reductions must be set forth on a program-by-program basis.

In preparing the report, the Comptroller General is to have "due regard" for the estimates and reductions set forth in a joint report submitted to him by the Director of CBO and the Director of OMB, the President's fiscal and budgetary advisor. However, the Act plainly contemplates that the Comptroller General will exercise his independent judgment and evaluation with respect to those estimates. The Act also provides that the Comptroller General's report "shall explain fully any differences between the contents of such report and the report of the Directors." § 251(b)(2).

Appellants suggest that the duties assigned to the Comptroller General in the Act are essentially ministerial and mechanical so that their performance does not constitute "execution of the law" in a meaningful sense. On the contrary, we view these functions as plainly entailing execution of the law in constitutional terms. Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of "execution" of the law. Under § 251, the Comptroller General must exercise judgment concerning facts that affect the application of the Act. He must also interpret the provisions of the Act to determine precisely what budgetary calculations are required. Decisions of that kind are typically made by officers charged with executing a statute.

The executive nature of the Comptroller General's functions under the Act is revealed in § 252(a)(3) which gives the Comptroller General the ultimate authority to determine the budget cuts to be made. Indeed, the Comptroller General commands the President himself to carry out, without the slightest variation (with exceptions not relevant to the constitutional issues presented), the directive of the Comptroller General as to the budget reductions:

> "The [Presidential] order *must provide* for reductions in the manner specified in section 251(a)(3), *must incorporate* the provisions of the [Comptroller General's] report submitted under section 251(b), and *must be consistent with such report in all respects*. The President *may not modify or recalculate any of the estimates, determinations, specifications, bases, amounts, or percentages* set forth in the report submitted under section 251(b) in determining the reductions to be specified in the order with respect to programs, projects, and activities, or with respect to budget activities, within an account . . . ." § 252(a)(3) (emphasis added).

See also § 251(d)(3)(A).

Congress of course initially determined the content of the Balanced Budget and Emergency Deficit Control Act; and undoubtedly the content of the Act determines the nature of the executive duty. However, as *Chadha* makes clear, once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation. *Chadha*, 462 U. S., at 958. By placing the responsibility for execution of the Balanced Budget and Emergency Deficit Control Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function. The Constitution does not permit such intrusion.

VI

We now turn to the final issue of remedy. Appellants urge that rather than striking down § 251 and invalidating the significant power Congress vested in the Comptroller General to meet a national fiscal emergency, we should take the lesser course of nullifying the statutory provisions of the 1921 Act that authorizes Congress to remove the Comptroller General. At oral argument, counsel for the Comptroller General suggested that this might make the Comptroller General removable by the President. All appellants urge that Congress would prefer invalidation of the removal provisions rather than invalidation of § 251 of the Balanced Budget and Emergency Deficit Control Act.

Severance at this late date of the removal provisions enacted 65 years ago would significantly alter the Comptroller General's office, possibly by making him subservient to the Executive Branch. Recasting the Comptroller General as an officer of the Executive Branch would accordingly alter the balance that Congress had in mind in drafting the Budget and Accounting Act of 1921 and the Balanced Budget and Emergency Deficit Control Act, to say nothing of the wide array of other tasks and duties Congress has assigned the Comptroller General in other statutes.[9] Thus appellant's argument would require this Court to undertake a weighing of the importance Congress attached to the removal provisions in the Budget and Accounting Act of 1921 as well as in other subsequent enactments against the importance it placed on the Balanced Budget and Emergency Deficit Control Act of 1985.

Fortunately this is a thicket we need not enter. The language of the Balanced Budget and Emergency Deficit Control Act itself settles the issue. In § 274(f), Congress has explicitly provided "fallback" provisions in the Act that take effect "[i]n the event . . . *any* of the reporting procedures described in section 251 are invalidated." § 274(f)(1) (emphasis added). The fallback provisions are "'fully operative as a law,'" *Buckley* v. *Valeo*, 424 U. S., at 108 (quoting *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma*, 286 U. S. 210, 234 (1932)). Assuming that appellants are correct in urging that this matter must be resolved on the basis of congressional intent, the intent appears to have been for § 274(f) to be given effect in this situation. Indeed, striking the removal provisions would lead to a statute that Congress would probably have refused to adopt. As the District Court concluded,

> "the grant of authority to the Comptroller General was a carefully considered protection against what the House conceived to be the pro-executive bias of the OMB. It is doubtful that the automatic deficit reduction process

---

[9] Since 1921, the Comptroller General has been assigned a variety of functions. See, *e. g.*, 2 U. S. C. A. § 687 (1982 ed., Supp. II) (duty to bring suit to require release of impounded budget authority); 42 U. S. C. § 6384(a) (duty to impose civil penalties under the Energy Policy and Conservation Act of 1975); 15 U. S. C. § 1862 (member of Chrysler Corporation Loan Guarantee Board); 45 U. S. C. § 711(d)(1)(C) (member of Board of Directors of United States Railway Association); 31 U. S. C. A. §§ 3551-3556 (West. Supp. 1986) (authority to consider bid protests under Competition in Contracting Act of 1984).

> would have passed without such protection, and doubtful that the protection would have been considered present if the Comptroller General were not removable by Congress itself. . . ." 626 F. Supp., at 1394.

Accordingly, rather than perform the type of creative and imaginative statutory surgery urged by appellants, our holding simply permits the fallback provisions to come into play.[10]

VII

No one can doubt that Congress and the President are confronted with fiscal and economic problems of unprecedented magnitude, but "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government. . . ." *Chadha, supra,* at 944.

We conclude the District Court correctly held that the powers vested in the Comptroller General under § 251 violate the command of the Constitution that the Congress play no direct role in the execution of the laws. Accordingly, the judgment and order of the District Court are affirmed.

Our judgment is stayed for a period not to exceed 60 days to permit Congress to implement the fallback provisions.

---

[10] Because we conclude that the Comptroller General, as an officer removable by Congress, may not exercise the powers conferred upon him by the Act, we have no occasion for considering appellees' other challenges to the Act, including their argument that the assignment of powers to the Comptroller General in § 251 violates the delegation doctrine, see, *e. g., A. L. A. Schechter Poultry Corp.* v. *United States,* 295 U. S. 495 (1935); *Yakus* v. *United States,* 321 U. S. 414 (1944).

SUPREME COURT OF THE UNITED STATES

Nos. 85–1377, 85–1378 AND 85–1379

CHARLES A. BOWSHER, COMPTROLLER GENERAL
OF THE UNITED STATES, APPELLANT
85–1377 *v.*
MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

UNITED STATES SENATE, APPELLANT
85–1378 *v.*
MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED
STATES HOUSE OF REPRESENTATIVES,
ET AL., APPELLANTS
85–1379 *v.*
MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[July 7, 1986]

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, concurring in the judgment.

When this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons. I agree with the Court that the "Gramm-Rudman-Hollings" Act contains a constitutional infirmity so severe that the flawed provision may not stand. I disagree with the Court, however, on the reasons why the Constitution prohibits the Comptroller General from exercising the powers assigned to him by § 251(b) and § 251(c)(2) of the Act. It is not the dormant, carefully circumscribed congressional removal power that represents the primary constitutional evil. Nor do I agree with the conclusion of both the majority and the dissent that the analysis depends on a labeling of the functions assigned to the Comptroller General as "executive powers." *Ante*, at 16–18; *post*, at 7–8. Rather, I am convinced that the Comptroller General must be characterized as an agent of Congress because of his longstanding statutory responsibilities; that the powers assigned to him under the Gramm-Rudman-Hollings Act require him to make policy that will bind the Nation; and that, when Congress, or a component or an agent of Congress, seeks to make policy that will bind the Nation, it must follow the procedures mandated by Article I of the Constitution—through passage by both Houses and presentment to the President. In short, Congress may not exercise its fundamental power to formulate national policy by delegating that power to one of its two Houses, to a legislative committee, or to an individual agent of the Congress such as the Speaker of the House of Representatives, the Sergeant at Arms of the Senate, or the Director of the Congressional Budget Office. *INS* v. *Chadha*, 462 U. S. 919 (1983). That principle, I believe, is applicable to the Comptroller General.

I

The fact that Congress retained for itself the power to remove the Comptroller General is important evidence supporting the conclusion that he is a member of the Legislative Branch of the Government. Unlike the Court, however, I am not persuaded that the congressional removal power is either a necessary, or a sufficient, basis for concluding that his statutory assignment is invalid.

As JUSTICE WHITE explains, *post*, at 12–13, Congress does not have the power to remove the Comptroller General at will, or because of disagreement with any policy determination that he may be required to make in the administration of this, or any other, Act. The statute provides a term of 15 years for the Comptroller General; it further provides that he must retire upon becoming 70 years of age, and that he may be removed at any time by impeachment or by "joint resolution of Congress, after notice and an opportunity for a hearing, only for—(i) permanent disability; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) a felony or conduct involving moral turpitude." 31 U. S. C. § 703(e)(1)(B). Far from assuming that this provision creates a "'here-and-now subservience'" respecting all of the Comptroller General's actions, *ante*, at 12, n. 5 (quoting District Court), we should presume that Congress will adhere to the law—that it would only exercise its removal powers if the Comptroller General were found to be permanently disabled, inefficient, neglectful, or culpable of malfeasance, a felony, or conduct involving moral turpitude.[1]

The notion that the removal power at issue here automatically creates some kind of "here-and-now subservience" of the Comptroller General to Congress is belied by history. There is no evidence that Congress has ever removed, or threatened to remove, the Comptroller General for reasons of policy. Moreover, the President has long possessed a comparable power to remove members of the Federal Trade Commission, yet it is universally accepted that they are independent of, rather than subservient to, the President in performing their official duties. Thus, the statute that the Court construed in *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), provided:

---

[1] Just as it is "always appropriate to assume that our elected representatives, like other citizens, know the law," *Cannon* v. *University of Chicago*, 441 U. S. 677, 696–697 (1979), so too is it appropriate to assume that our elected representatives, like other citizens, will respect the law. As the proceedings in the United States Senate resulting from the impeachment of Justice Chase demonstrate, moreover, if that body were willing to give only lip service to the governing standard, political considerations rather than "good behavior" would determine the tenure of federal judges. See M. Elsmere, The Impeachment Trial of Justice Samuel Chase 205 (1962); 3 A. Beveridge, The Life of John Marshall 157–223 (1919). See also W. Wilson, Congressional Government: A Study in American Politics 186–187 (Meridian Books ed., 1956) (quoted in Levi, Some Aspects of Separation of Powers, 76 Colum. L. Rev. 369, 380 (1976)):

"'If there be one principle clearer than another, it is this: that in any business, whether of government or of mere merchandising, *somebody must be trusted*, in order that when things go wrong it may be quite plain who should be punished. . . . *Power and strict accountability of its use* are the essential constituents of good government.'" (Emphasis in original).

> "Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." 38 Stat. 718.

In upholding the congressional limitations on the President's power of removal, the Court stressed the independence of the Commission from the President.[2] There was no suggestion that the retained Presidential removal powers—similar to those at issue here—created a subservience to the President.[3]

---

[2] See *Humphrey's Executor*, 295 U. S., at 625–626 (describing congressional intention to create "a body which shall be independent of executive authority, *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government") (emphasis in original).

[3] The manner in which President Roosevelt exercised his removal power further underscores the propriety of presuming that Congress, and the President, will not use statutorily prescribed removal causes as pretexts for other removal reasons. President Roosevelt never claimed that his removal of Humphrey was for one of the statutorily prescribed reasons—inefficiency, neglect of duty, or malfeasance in office. The President's removal letter merely stated:

"'Effective as of this date you are hereby removed from the office of Commissioner of the Federal Trade Commission.'" See, *id.*, at 619.

Previously, the President had written to Commissioner Humphrey stating:

"'You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence.'" *Ibid.*

To be sure, there may be a significant separation of powers difference between the President's *exercise* of carefully circumscribed removal authority and Congress' *exercise* of identically circumscribed removal authority. But the *Humphrey's Executor* analysis at least demonstrates that it is entirely proper for Congress to specify the qualifications for an office that it has created, and that the prescription of what might be termed "dereliction-of-duty" removal standards does not itself impair the independence of the official subject to such standards.[4]

The fact that Congress retained for itself the power to remove the Comptroller General thus is not necessarily an adequate reason for concluding that his role in the Gramm-Rudman-Hollings budget reduction process is unconstitutional. It is, however, a fact that lends support to my ultimate conclusion that, in exercising his functions under this Act, he serves as an agent of the Congress.

---

[4] Indeed, even in *Myers* v. *United States*, 272 U. S. 52 (1926), in its challenge to the provision requiring Senate approval of the removal of a postmaster, the Federal Government assumed that Congress had power to limit the terms of removal to reasons that relate to the office. Solicitor General Beck recognized "that the power of removal may be subject to such general laws as do not destroy the exercise by the President of his power of removal, and which leaves to him the exercise of the power subject to such general laws as may fairly measure the standard of public service." Substitute Brief for United States on Reargument in No. 2, O. T. 1926, p. 9. At oral argument, the Solicitor General explained his position:

"Mr. BECK . . . Suppose the Congress creates an office and says that it shall only be filled by a man learned in the law; and suppose it further provides that, if a man ceases to be member of the bar, he shall be removed. I am not prepared to say that such a law can not be reconciled with the Constitution. What I do say is that, when the condition imposed upon the creation of the office has no reasonable relation to the office; when it is not a legislative standard to be applied by the President, and is not the declaration of qualifications, but is the creation of an appointing power other than the President, then Congress has crossed the dead line, for it has usurped the prerogative of the President." 272 U. S. at 96–97.

II

In assessing the role of the Comptroller General, it is appropriate to consider his already existing statutory responsibilities. Those responsibilities leave little doubt that one of the identifying characteristics of the Comptroller General is his statutorily required relationship to the Legislative Branch.

In the statutory section that identifies the Comptroller General's responsibilities for investigating the use of public money, four of the five enumerated duties specifically describe an obligation owed to Congress. The first is the only one that does not expressly refer to Congress: The Comptroller General shall "investigate all matters related to the receipt, disbursement, and use of public money." 31 U. S. C. § 712(1). The other four clearly require the Comptroller General to work with Congress' specific needs as his legal duty. Thus, the Comptroller General must "estimate the cost to the United States Government of complying with each restriction on expenditures of a specific appropriation in a general appropriation law *and report each estimate to Congress with recommendations* the Comptroller General considers desirable." § 712(2) (emphasis added). He must "analyze expenditures of each executive agency the Comptroller General believes *will help Congress decide* whether public money has been used and expended economically and efficiently." § 712(3) (emphasis added). He must "make an investigation and report *ordered by either House of Congress or a committee of Congress* having jurisdiction over revenue, appropriations, or expenditures." § 712(4). Finally, he must "give *a committee of Congress* having jurisdiction over revenue, appropriations, or expenditures the help and information the committee requests." § 712(5) (emphasis added).

The statutory provision detailing the Comptroller General's role in evaluating programs and activities of the United States Government similarly leaves no doubt regarding the beneficiary of the Comptroller General's labors. The Comptroller General may undertake such an evaluation for one of three specified reasons: (1) on his own initiative; (2) "when either House of Congress orders an evaluation"; or (3) "when a committee of Congress with jurisdiction over the program or activity requests the evaluation." 31 U. S. C. § 717(b). In assessing a program or activity, moreover, the Comptroller General's responsibility is to "develop and recommend *to Congress* ways to evaluate a program or activity the Government carries out under existing law." § 717(c) (emphasis added).

The Comptroller General's responsibilities are repeatedly framed in terms of his specific obligations to Congress. Thus, one provision specifies in some detail the obligations of the Comptroller General with respect to an individual committee's request for a program evaluation:

> "On request of a committee of Congress, the Comptroller General shall help the committee to—
>
> "(A) develop a statement of legislative goals and ways to assess and report program performance related to the goals, including recommended ways to assess performance, information to be reported, responsibility for reporting, frequency of reports, and feasibility of pilot testing; and
>
> "(B) assess program evaluations prepared by and for an agency." 31 U. S. C. § 717(d)(1).

Similarly, another provision requires that, on "request of a member of Congress, the Comptroller General shall give the member a copy of the material the Comptroller General compiles in carrying out this subsection that has been released by the committee for which the material was compiled." § 717(d)(2).

Numerous other provisions strongly support the conclusion that one of the Comptroller General's primary responsibilities is to work specifically on behalf of Congress. The

Comptroller General must make annual reports on specified subjects to Congress, to the Senate Committee on Finance, to the Senate Committee on Governmental Affairs, to the House Committee on Ways and Means, to the House Committee on Government Operations, and to the Joint Committee on Taxation. 31 U. S. C. §§ 719(a),(d). On request of a committee, the Comptroller General "shall explain to and discuss with the committee or committee staff a report the Comptroller General makes that would help the committee—(1) evaluate a program or activity of an agency within the jurisdiction of the committee; or (2) in its consideration of proposed legislation." § 719(i). Indeed, the relationship between the Comptroller General and Congress is so close that the "Comptroller General may assign or detail an officer or employee of the General Accounting Office to full-time continuous duty with a committee of Congress for not more than one year." 31 U. S. C. § 734(a).

The Comptroller General's current statutory responsibilities on behalf of Congress are fully consistent with the historic conception of the Comptroller General's office. The statute that created the Comptroller General's office—the Budget and Accounting Act of 1921—provided that four of the five statutory responsibilities given to the Comptroller General be exercised on behalf of Congress, three of them exclusively so.[5] On at least three occasions since 1921, more-

---

[5] In pertinent part, the 1921 Act provided:

"SEC. 312(a) The Comptroller General shall investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds, and shall make to the President when requested by him, and *to Congress at the beginning of each regular session*, a report in writing of the work of the General Accounting Office, containing recommendations concerning the legislation he may deem necessary to facilitate the prompt and accurate rendition and settlement of accounts and concerning such other matters relating to the receipt, disbursement, and application of public funds as he may think advisable. In such regular report, or in special reports at any time when Congress is in over, in considering the structure of government, Congress has defined the Comptroller General as being a part of the Legislative Branch. In the Reorganization Act of 1945, Congress specified that the Comptroller General and the General Accounting Office "are a part of the legislative branch of the Government." 59 Stat. 616.[6] In the Reorganization Act of 1949, Congress again confirmed that the Comptroller General and the General Accounting Office "are a part of the legislative branch of the Government." 63 Stat. 205.[7] Finally, in the Budget and Accounting Procedures Act of 1950, Congress required the "auditing for the Government, conducted by the Comptroller General of the United States as an agent

---

session, he shall make recommendations looking to greater economy or efficiency in public expenditures.

"(b) He shall make such investigations and reports as shall be ordered by *either House of Congress of by any committee of either House having jurisdiction over revenue, appropriations, or expenditures.* The Comptroller General shall also, at the request of any such committee, direct assistants from his office to furnish the committee such aid and information as it may request.

"(c) The Comptroller General shall specificallly report *to Congress* every expenditure or contract made by any department or establishment in any year in violation of law.

"(d) He shall submit *to Congress* reports upon the adequacy and effectiveness of the administrative examination of accounts and claims in the respective departments and establishments and upon the adequacy and effectiveness of departmental inspection of the offices and accounts of fiscal officers.

"(e) He shall furnish such information relating to expenditures and accounting to the Bureau of the Budget as it may request from time to time." 42 Stat. 25–26 (emphases added).

[6] See also H. R. Rep. No. 971 (1945), 79th Cong., 1 Sess., 12 ("[T]he Comptroller General of the United States" and "the General Accounting Office . . . are declared by the bill to be a part of the legislative branch of the Government").

[7] See also H. R. Rep. No. 23 (1949), 81st Cong., 1 Sess., 11 ("[T]he Comptroller General of the United States" and "the General Accounting Office . . . (as in the Reorganization Act of 1945) are declared by the bill to be a part of the legislative branch of the Government").

of the Congress." 64 Stat. 835. Like the already existing statutory responsibilities, then, the history of the Comptroller General statute confirms that the Comptroller General should be viewed as an agent of the Congress.

This is not to say, of course, that the Comptroller General has no obligations to the Executive Branch, or that he is an agent of the Congress in quite so clear a manner as the Doorkeeper of the House. For the current statutory responsibilities also envision a role for the Comptroller General with respect to the Executive Branch. The Comptroller General must "give the President information on expenditures and accounting the President requests." 31 U. S. C. § 719(f). Although the Comptroller General is required to provide Congress with an annual report, he is also required to provide the President with the report if the President so requests. § 719(a). The Comptroller General is statutorily required to audit the Internal Revenue Service and the Bureau of Alcohol, Tobacco, and Firearms (and provide congressional committees with information respecting the audits). § 713. In at least one respect, moreover, the Comptroller General is treated like an executive agency: "To the extent applicable, all laws generally related to administering an agency apply to the Comptroller General." § 704(a). Historically, as well, the Comptroller General has had some relationship to the Executive Branch. As noted, n. 5, *supra*, in the 1921 Act, one of the Comptroller General's specific responsibilities was to provide information to the Bureau of the Budget. In fact, when the Comptroller General's office was created, its functions, personnel, records, and even furniture derived from a previous Executive office.[8]

---

[8] See 42 Stat. 23 ("The offices of Comptroller of the Treasury and Assistant Comptroller of the Treasury are abolished, to take effect July 21, 1921. . . . [A]ll books, records, documents, papers, furniture, office equipment and other property of the office of the Comptroller of the Treasury shall become the property of the General Accounting Office").

Thus, the Comptroller General retains certain obligations with respect to the Executive Branch.[9] Obligations to two Branches are not, however, impermissible and the presence of such dual obligations does not prevent the characterization of the official with the dual obligations as part of one branch.[10] It is at least clear that, in most, if not all, of his statutory responsibilities, the Comptroller General is properly characterized as an agent of the Congress.[11]

---

[9] The Comptroller General, of course, is also appointed by the President. 31 U. S. C. § 703 (a)(1). So too, however, are the Librarian of Congress, 2 U. S. C. § 136, the Architect of the Capitol, 40 U. S. C. § 162, and the Public Printer, 44 U. S. C. § 301.

[10] See *Pennsylvania Bureau of Correction* v. *United States Marshals Service*, 474 U. S. ——, —— (1985) (slip op. 2–4, and n. 1) (reviewing the Marshals' statutory obligations to the Judiciary and the Executive Branch, but noting that the "Marshals are within the Executive Branch of the Federal Government"). Cf. Report by the Comptroller General, U. S. Marshals' Dilemma: Serving Two Branches of Government 14 (1982) ("It is extremely difficult for one person to effectively serve two masters"). Surely no one would suggest that the fact that THE CHIEF JUSTICE performs executive functions for the Smithsonian Institution, 20 U. S. C. § 42, affects his characterization as a member of the Judicial Branch of the Government. Nor does the performance of similar functions by three Members of the Senate and three Members of the House, *ibid.*, affect their characterization as members of the Legislative Branch of the Government.

[11] Despite the suggestions of the dissents, *post*, at 16, n. 12 (WHITE, J., dissenting); *post*, at 3, n. 1 (BLACKMUN, J., dissenting), it is quite obvious that the Comptroller General, and the General Accounting Office, have a fundamentally different relationship with Congress than do independent agencies like the Federal Trade Commission. Rather than an independent agency, the Comptroller General and the GAO are functionally equivalent to congressional agents such as the Congressional Budget Office, the Office of Technology Assessment, and the Library of Congress' Congressional Research Service. As the statutory responsibilities make clear, like those congressional agents, the Comptroller General and the General Accounting Office function virtually as a permanent staff for Congress. Indeed, in creating the Congressional Budget Office, Congress explicitly required that the GAO provide extensive services for the CBO—a fact with some significance for this case. The CBO statute enumerates the three "congressional agencies" that must provide assistance to the CBO—"the Gen-

III

Everyone agrees that the powers assigned to the Comptroller General by §251(b) and §251(c)(2) of the Gramm-Rudman-Hollings Act are extremely important. They require him to exercise sophisticated economic judgment concerning anticipated trends in the Nation's economy, pro-

---

eral Accounting Office, the Library of Congress, and the Office of Technology Assessment." 2 U. S. C. §601(e). These "congressional agencies" are authorized to provide the CBO with "services, facilities, and personnel with or without reimbursement," *ibid.*, as well as "information, data, estimates, and statistics." *Ibid.* See also Congressional Quarterly's Guide to Congress 555 (3d ed. 1982) ("In addition to their staffs, committees, facilities and privileges, members of Congress are backed by a number of other supporting organizations and activities that keep Capitol Hill running. Among the largest of these in terms of staff are the General Accounting Office (GAO), with about 5,200 employees; the Library of Congress' Congressional Research Service (CRS), with 856; the Congressional Budget Office (CBO), with 218; and the Office of Technology Assessment (OTA), with 130. . . . To an extent, each of the four legislative agencies has its own specialized functions. . . . Although each of the four has been given its own task, their jobs overlap to some extent. This has led in some cases to duplication and waste and even to competition among the different groups. . . . The General Accounting Office is an arm of the legislative branch that was created to oversee the expenditures of the executive branch").

Thus, to contend that the Comptroller General's numerous statutory responsibilities to serve Congress directly are somehow like an independent agency's obligations to report to Congress and to implement legislatively mandated standards simply misconceives the actual duties of the Comptroller General and the General Accounting Office. It also ignores the clear import of the legislative history of these entities. See, *e. g.*, *Ameron, Inc.* v. *United States Army Corps of Engineers*, 787 F. 2d 875, 892-893 (CA3 1986) (Becker, J., concurring in part) ("Because the office of the Comptroller General is created by statute, the Comptroller General's status within the government is a matter of statutory interpretation which, like all statutory interpretation, is controlled by legislative intent. . . . There is copious evidence in the legislative history that the GAO (and therefore the Comptroller General) was intended to be in the legislative branch. . . . Because there is no legislative intent to the contrary, I believe that it is incumbent upon us to hold that the Comptroller General is within the legislative branch of the government, despite the inconveniences that may attend such a holding").

jected levels of unemployment, interest rates, and the special problems that may be confronted by the many components of a vast federal bureaucracy. His duties are anything but ministerial—he is not merely a clerk wearing a "green eye shade" as he undertakes these tasks. Rather, he is vested with the kind of responsibilities that Congress has elected to discharge itself under the fallback provision that will become effective if and when § 251(b) and § 251(c)(2) are held invalid. Unless we make the naive assumption that the economic destiny of the Nation could be safely entrusted to a mindless bank of computers, the powers that this Act vests in the Comptroller General must be recognized as having transcendent importance.[12]

The Court concludes that the Gramm-Rudman-Hollings Act impermissibly assigns the Comptroller General "executive powers." *Ante*, at 16. The dissent agrees that "the powers exercised by the Comptroller under the Act may be characterized as 'executive' in that they involve the interpretation and carrying out of the Act's mandate." *Post*, at 7. This conclusion is not only far from obvious but also rests on the unstated and unsound premise that there is a definite line that distinguishes executive power from legislative power.

"The great ordinances of the Constitution do not establish and divide fields of black and white." *Springer* v. *Philippine Islands*, 277 U. S. 189, 209 (1928) (Holmes, J., dissenting). "The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." *Buckley* v. *Valeo*, 424 U. S. 1, 121 (1976). As Justice Brandeis explained in his dissent in the *Myers* case: "The separation of the powers of government did not make each branch completely autonomous. It left each, in some measure, dependent upon the others, as it left to each power to exercise, in some respects, functions in their nature executive, legislative and judicial." *Myers* v. *United States*, 272 U. S. 52, 291 (1926).

---

[12] The element of judgment that the Comptroller General must exercise is evident by the congressional recognition that there may be "differences between the contents of [his] report and the report of the Directors" of the Congressional Budget Office and the Office of Management and Budget. § 251(b)(2).

One reason that the exercise of legislative, executive, and judicial powers cannot be categorically distributed among three mutually exclusive branches of government is that governmental power cannot always be readily characterized with only one of those three labels. On the contrary, as our cases demonstrate, a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned. For this reason, "[w]hen any Branch acts, it is presumptively exercising the power the Constitution has delegated to it." *INS* v. *Chadha*, 462 U. S., at 951.[13]

The *Chadha* case itself illustrates this basic point. The governmental decision that was being made was whether a resident alien who had overstayed his student visa should be deported. From the point of view of the administrative law judge who conducted a hearing on the issue—or as JUSTICE POWELL saw the issue in his concurrence[14]—the decision took on a judicial coloring. From the point of view of the Attorney General of the United States to whom Congress had delegated the authority to suspend deportation of certain aliens, the decision appeared to have an executive character.[15] But, as the Court held, when the House of Representatives finally decided that Chadha must be deported, its action "was essentially legislative in purpose and effect." *Id.*, at 952.

---

[13] "Perhaps as a matter of political science we could say that Congress should only concern itself with broad principles of policy and leave their application in particular cases to the executive branch. But no such rule can be found in the Constitution itself or in legislative practice. It is fruitless, therefore, to try to draw any sharp and logical line between legislative and executive functions. Characteristically, the draftsmen of 1787 did not even attempt doctrinaire definitions, but placed their reliance in the mechanics of the Constitution. One of their principal devices was to vest the legislative powers in the two Houses of Congress and to make the President a part of the legislative process by requiring that all bills passed by the two Houses be submitted to him for his approval or disapproval, his disapproval or veto to be overridden only by a two-thirds vote of each House. It is in such checks upon powers, rather than in the classifications of powers, that our governmental system finds equilibrium." Ginnane, The Control of Federal Administration by Congressional Resolutions and Committees, 66 Harv. L. Rev. 569, 571 (1953) (footnote omitted).

The powers delegated to the Comptroller General by § 251 of the Act before us today have a similar chameleon-like quality. The District Court persuasively explained why they may be appropriately characterized as executive powers.[16] But, when that delegation is held invalid, the "fallback provision" provides that the report that would otherwise be issued by the Comptroller General shall be issued by Congress itself.[17] In the event that the resolution is enacted, the congressional report will have the same legal consequences as if it had been issued by the Comptroller General. In that event, moreover, surely no one would suggest that Congress had acted in any capacity other than "legislative." Since the District Court expressly recognized the validity of what it described as the "'fallback' deficit reduction process," *Synar* v. *United States*, 626 F. Supp. 1374, 1377 (1986), it obviously did not doubt the constitutionality of the performance by Congress of the functions delegated to the Comptroller General.

---

[14] For JUSTICE POWELL the critical question in the *Chadha* case was "whether Congress impermissibly assumed a judicial function." 462 U. S., at 963.

[15] "It is clear, therefore, that the Attorney General acts in his presumptively Art. II capacity when he administers the Immigration and Nationality Act." *Id.*, at 953, n. 16.

[16] "Under subsection 251(b)(1), the Comptroller General must specify levels of anticipated revenue and expenditure that determine the gross amount which must be sequestered; and he must specify which particular budget items are required to be reduced by the various provisions of the Act (which are not in all respects clear), and in what particular amounts. The first of these specifications requires the exercise of substantial judgment concerning present and future facts that affect the application of the law—the sort of power normally conferred upon the executive officer charge with implementing a statute. The second specification requires an interpretation of the law enacted by Congress, similarly a power normally committed initially to the Executive under the Constitution's prescription that he 'take Care that the Laws be faithfully executed.' Art. II, § 3." *Synar* v. *United States*, 626 F. Supp. 1374, 1400 (1969).

[17] Section 274(f) of the Act provides, in part:

"Alternative procedures for the joint reports of the Directors.—

Under the District Court's analysis, and the analysis adopted by the majority today, it would therefore appear that the function at issue is "executive" if performed by the Comptroller General but "legislative" if performed by the Congress. In my view, however, the function may appropriately be labeled "legislative" even if performed by the Comptroller General or by an executive agency.

Despite the statement in Article I of the Constitution that "All legislative Powers herein granted shall be vested in a

---

"(1) In the event that any of the reporting procedures described in section 251 are invalidated, then any report of the Directors referred to in section 251(a) or (c)(1) . . . shall be transmitted to the joint committee established under this subsection.

"(2) Upon the invalidation of any such procedure there is established a Temporary Joint Committee on Deficit Reduction, composed of the entire membership of the Budget Committees of the House of Representatives and the Senate. . . . The purposes of the Joint Committee are to receive the reports of the Directors as described in paragraph (1), and to report (with respect to each such report of the Directors) a joint resolution as described in paragraph (3).

"(3) No later than 5 days after the receipt of a report of the Directors in accordance with paragraph (1), the Joint Committee shall report to the House of Representatives and the Senate a joint resolution setting forth the contents of the report of the Directors.

. . . . .

"(5) *Upon its enactment, the joint resolution shall be deemed to be the report received by the President under section 251(b) or (c)(2)* (whichever is applicable)." (Emphasis added).

Congress of the United States," it is far from novel to acknowledge that independent agencies do indeed exercise legislative powers. As JUSTICE WHITE explained in his *Chadha* dissent, after reviewing our cases upholding broad delegations of legislative power:

> "[T]hese cases establish that by virtue of congressional delegation, legislative power can be exercised by independent agencies and Executive departments without the passage of new legislation. For some time, the sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process. There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term. The Administrative Procedure Act, 5 U. S. C. §551(4), provides that a 'rule' is an agency statement 'designed to implement, interpret, or prescribe law or policy.' When agencies are authorized to prescribe law through substantive rulemaking, the administrator's regulation is not only due deference, but is accorded 'legislative effect.' See, *e. g.*, *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 43-44 (1981); *Batterton* v. *Francis*, 432 U. S. 416 (1977). These regulations bind courts and officers of the Federal Government, may preempt state law, see, *e. g.*, *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141 (1982), and grant rights to and impose obligations on the public. In sum, they have the force of law." 462 U. S., at 985-986 (footnote omitted).

Thus, I do not agree that the Comptroller General's responsibilities under the Gramm-Rudman-Hollings Act must be termed "executive powers," or even that our inquiry is much advanced by using that term. For, whatever the label given the functions to be performed by the Comptroller General under §251—or by the Congress under §274—the

District Court had no difficulty in concluding that Congress could delegate the performance of those functions to another branch of the Government.[18] If the delegation to a stranger is permissible, why may not Congress delegate the same responsibilities to one of its own agents? That is the central question before us today.

IV

Congress regularly delegates responsibility to a number of agents who provide important support for its legislative activities. Many perform functions that could be characterized as "executive" in most contexts—the Capitol Police can arrest and press charges against law breakers, the Sergeant at Arms manages the congressional payroll, the Capitol Architect maintains the buildings and grounds, and its Librarian has custody of a vast number of books and records. Moreover, the Members themselves necessarily engage in many activities that are merely ancillary to their primary lawmaking responsibilities—they manage their separate offices, they communicate with their constituents, they conduct hearings, they inform themselves about the problems confronting the Nation, and they make rules for the governance of their own business. The responsibilities assigned to the Comptroller General in the case before us are, of course, quite different from these delegations and ancillary activities.

---

[18] "All that has been left to administrative discretion is the estimation of the aggregate amount of reductions that will be necessary, in light of predicted revenues and expenditures, and we believe that the Act contains standards adequately confining administrative discretion in making that estimation. While this is assuredly an estimation that requires some judgment, and on which various individuals may disagree, we hardly think it is a distinctively *political* judgment, much less a political judgment of such scope that it must be made by Congress itself. Through specification of maximum deficit amounts, establishment of a detailed administrative mechanism, and determination of the standards governing administrative decisionmaking, Congress has made the policy decisions which constitute the essence of the legislative function." 626 F. Supp., at 1391.

The District Court's holding that the exercise of discretion was not the kind of political judgment that "must be made by Congress itself" is, of course, consistent with the view that it is a judgment that "*may* be made by Congress itself" pursuant to § 274.

The Gramm-Rudman-Hollings Act assigns to the Comptroller General the duty to make policy decisions that have the force of law. The Comptroller General's report is, in the current statutue, the engine that gives life to the ambitious budget reduction process. It is the Comptroller General's report that "provide[s] for the determination of reductions" and that "contain[s] estimates, determinations, and specifications for all of the items contained in the report" submitted by the Office of Management and Budget and the Congressional Budget Office. § 251(b). It is the Comptroller General's Report that the President must follow and that will have conclusive effect. § 252. It is, in short, the Comptroller General's report that will have a profound, dramatic, and immediate impact on the government and on the Nation at large.

Article I of the Constitution specifies the procedures that Congress must follow when it makes policy that binds the Nation: its legislation must be approved by both Houses of Congress and presented to the President. In holding that an attempt to legislate by means of a "one House veto" violated the procedural mandate in Article I, we explained:

> "We see therefore that the Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions. The President's participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws. The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings. The President's unilateral veto power, in turn, was limited by the power of two-thirds of both Houses of Congress to overrule a veto thereby pre-

> cluding final arbitrary action of one person. . . . It emerges clearly that the prescription for legislative action in Art. I, §§1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *INS* v. *Chadha*, 462 U. S., at 951.

If Congress were free to delegate its policymaking authority to one of its components, or to one of its agents, it would be able to evade "the carefully crafted restraints spelled out in the Constitution." *Id.*, at 959.[19] That danger—congressional action that evades constitutional restraints—is not present when Congress delegates lawmaking power to the executive or to an independent agency.[20]

The distinction between the kinds of action that Congress may delegate to its own components and agents and those that require either compliance with Article I procedures or delegation to another Branch pursuant to defined standards is reflected in the practices that have developed over the years regarding congressional resolutions. The *joint* resolution, which is used for "special purposes and . . . incidental matters," 7 Deschler's Precedents of the House of Representatives, 334 (1977), makes binding policy and "requires an affirmative vote by both Houses and submission to the President for approval" *id.*, at 333—the full Article I requirements. A *concurrent* resolution, in contrast, makes no binding policy; it is "a means of expressing fact, principles, opinions, and purposes of the two Houses," Jefferson's Manual and Rules of the House of Representatives 176 (1983), and thus does not need to be presented to the President. It is settled, however, that if a resolution is intended to make policy that will bind the Nation and thus is "legislative in its character and effect," S. Rep. No. 1335, 54th Cong., 2d Sess., 8 (1897)—then the full Article I requirements must be observed. For "the nature or substance of the resolution, and not its form, controls the question of its disposition." *Ibid.*

---

[19] Even scholars who would have sustained the one House veto appear to agree with this ultimate conclusion. See Nathanson, Separation of Powers and Administrative Law: Delegation, The Legislative Veto, and the "Independent" Agencies, 75 Nw. U. L. Rev. 1064, 1090 (1981) ("It is not a case where the Congress has delegated authority to one of its components to take affirmative steps to impose regulations upon private interests—an action which would, I assume, be unconstitutional"). Cf. *Buckley* v. *Valeo*, 424 U. S. 1, 286 (1976) (WHITE, J., dissenting) (expressing the opinion that a one House veto of agency regulations would be unobjectionable, but adding that it "would be considerably different if Congress itself purported to adopt and propound regulations by the action of both Houses").

[20] As I have emphasized, in this case, the Comptroller General is assigned functions that require him to make policy determinations that bind the Nation. I note only that this analysis need not call into question the Comptroller General's performance of numerous existing functions that may not rise to this level. See *ante*, at 17, n. 7.

In my opinion, Congress itself could not exercise the Gramm-Rudman-Hollings functions through a concurrent resolution. The fact that the fallback provision in § 274 requires a joint resolution rather than a concurrent resolution indicates that Congress endorsed this view.[21] I think it equally clear that Congress may not simply delegate those functions to an agent such as the Congressional Budget Office. Since I am persuaded that the Comptroller General is also fairly deemed to be an agent of Congress, he too cannot exercise such functions.[22]

---

[21] The fact that Congress specified a joint resolution as the fallback provision has another significance as well. For it reveals the congressional intent that, if the Comptroller General could not exercise the prescribed functions, Congress wished to perform them itself, rather than delegating them, for instance, to an independent agency or to an Executive Branch official. This choice shows that Congress intended that the important functions of the Act be no further from itself than the Comptroller General.

[22] In considering analogous problems, our state courts have consistently recognized the importance of strict adherence to constitutionally mandated procedures in the legislative process. See, *e. g.*, *State* v. *A. L. I. V. E. Voluntary*, 606 P. 2d 769, 773, 777 (Alaska 1980) ("Of course, when the legislature wishes to act in an advisory capacity it may act by resolution.

As a result, to decide this case there is no need to consider the Decision of 1789, the President's removal power, or the abstract nature of "executive powers." Once it is clear that the Comptroller General, whose statutory duties define him as an agent of Congress, has been assigned the task of making policy determinations that will bind the Nation, the question is simply one of congressional process. There can be no doubt that the Comptroller General's statutory duties under Gramm-Rudman-Hollings do not follow the constitutionally prescribed procedures for congressional lawmaking.[23]

In short, even though it is well settled that Congress may delegate legislative power to independent agencies or to the Executive, and thereby divest itself of a portion of its lawmaking power, when it elects to exercise such power itself, it may not authorize a lesser representative of the Legislative Branch to act on its behalf.[24] It is for this reason that I be-

---

However, when it means to take action having a binding effect on those outside the legislature it may do so only by following the enactment procedures. Other state courts have so held with virtual unanimity. . . . The fact that it can delegate legislative power to others who are not bound by article II does not mean that it can delegate the same power to itself and, in the process, escape from the constraints under which it must operate"); *People* v. *Tremaine*, 252 N. Y. 27, 44 168 N. E. 817, 822 (1929) ("If the power to approve the segregation of lump sum appropriations may be delegated to any one, even to one or two members of the Legislature, it necessarily follows that the power to segregate such appropriations may also be conferred upon such delegates. . . . To visualize an extreme case, one lump sum appropriation might be made to be segregated by the committee chairmen. Such a delegation of legislative power would be abho[rr]ent to all our notions of legislation on the matter of appropriations").

[23] I have previously noted my concern about the need for a "due process of lawmaking" even when Congress has acted with bicameralism and presentment. See *Fullilove* v. *Klutznick*, 448 U. S. 448, 549, and n. 24 (1980) (STEVENS, J., dissenting); *Delaware Tribal Business Committee* v. *Weeks*, 430 U. S. 73, 98, and n. 11 (1977) (STEVENS, J., dissenting). When a legislature's agent is given powers to act without even the formalities of the legislative process, these concerns are especially prominent.

[24] See also Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 Cal. L. Rev. 983, 1067, n. 430 (1975) ("A delega-

lieve § 251(b) and § 251(c)(2) of the Act are unconstitutional.[25]

Thus, the critical inquiry in this case concerns not the manner in which Executive officials or agencies may act, but the manner in which Congress and its agents may act. As we emphasized in *Chadha*, when Congress legislates, when it makes binding policy, it must follow the procedures prescribed in Article I. Neither the unquestioned urgency of the national budget crisis nor the Comptroller General's proud record of professionalism and dedication provides a justification for allowing a congressional agent to set policy that binds the Nation. Rather than turning the task over to its agent, if the Legislative Branch decides to act with conclu-

---

tion which disperses power is not necessarily constitutionally equivalent to one which concentrates power in the hands of the delegating agency"); Ginnane, 66 Harv. L. Rev., at 595 ("It is a non sequitur to say that, since a statute can delegate a power to someone not bound by the procedure prescribed in the Constitution for Congress' exercise of the power, it can therefore 'delegate' the power to Congress free of constitutional restrictions on the manner of its exercise").

[25] JUSTICE BLACKMUN suggests that Congress may delegate legislative power to one of its own agents as long as it does not retain "tight control" over that agent. *Post*, at 4, n. 1. His suggestion is not faithful to the rationale of *Chadha* because no component of Congress, not even one of its Houses, is subject to the "tight control" of the entire Congress. For instance, the Congressional Research Service, whose primary function is to respond to congressional research requests, 2 U. S. C. § 166, apparently would not fall within JUSTICE BLACKMUN's "tight control" test because Congress has guaranteed the Service "complete research independence and the maximum practicable administrative independence consistent with these objectives." § 166(b)(2). I take it, however, that few would doubt the unconstitutionality of assigning the functions at issue in this case to the Congressional Research Service. Moreover, *Chadha* surely forecloses the suggestion that because delegation of legislative power to an independent agency is acceptable, such power may also be delegated to a component or an agent of Congress. Finally, with respect to JUSTICE BLACKMUN's emphasis on Presidential appointment of the Comptroller General, *post*, at 3, n. 1, as I have previously pointed out, other obvious congressional agents, such as the Librarian of Congress, the Architect of the Capitol, and the Public Printer are also appointed by the President. See n. 9, *supra*.

sive effect, it must do so through a process akin to that specified in the fallback provision—through enactment by both Houses and presentment to the President.

I concur in the judgment.

SUPREME COURT OF THE UNITED STATES

Nos. 85–1377, 85–1378 AND 85–1379

CHARLES A. BOWSHER, COMPTROLLER GENERAL
OF THE UNITED STATES, APPELLANT
85–1377 *v.*
MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

UNITED STATES SENATE, APPELLANT
85–1378 *v.*
MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED
STATES HOUSE OF REPRESENTATIVES,
ET AL., APPELLANTS
85–1379 *v.*
MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[July 7, 1986]

JUSTICE WHITE, dissenting.

The Court, acting in the name of separation of powers, takes upon itself to strike down the Gramm-Rudman-Hollings Act, one of the most novel and far-reaching legislative responses to a national crisis since the New Deal. The basis of the Court's action is a solitary provision of another statute that was passed over sixty years ago and has lain dormant since that time. I cannot concur in the Court's action. Like the Court, I will not purport to speak to the wisdom of the policies incorporated in the legislation the Court invalidates;

that is a matter for the Congress and the Executive, *both* of which expressed their assent to the statute barely half a year ago. I will, however, address the wisdom of the Court's willingness to interpose its distressingly formalistic view of separation of powers as a bar to the attainment of governmental objectives through the means chosen by the Congress and the President in the legislative process established by the Constitution. Twice in the past four years I have expressed my view that the Court's recent efforts to police the separation of powers have rested on untenable constitutional propositions leading to regrettable results. See *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 92–118 (1982) (WHITE, J., dissenting); *INS* v. *Chadha*, 462 U. S. 919, 967–1003 (WHITE, J., dissenting). Today's result is even more misguided. As I will explain, the Court's decision rests on a feature of the legislative scheme that is of minimal practical significance and that presents no substantial threat to the basic scheme of separation of powers. In attaching dispositive significance to what should be regarded as a triviality, the Court neglects what has in the past been recognized as a fundamental principle governing consideration of disputes over separation of powers:

> "The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J. concurring).

I

The Court's argument is straightforward: the Act vests the Comptroller General with "executive" powers, that is, powers to "[i]nterpre[t] a law enacted by Congress [in order] to implement the legislative mandate," *ante*, at 17; such powers may not be vested by Congress in itself or its agents, see *Buckley* v. *Valeo*, 424 U. S. 1, 120–141 (1976), for the system of government established by the Constitution for the most part limits Congress to a legislative rather than an executive or judicial role, see *INS* v. *Chadha*, *supra;* the Comptroller General is an agent of Congress by virtue of a provision in the Budget and Accounting Act of 1921, 43 Stat. 23, 31 U. S. C. § 703(e)(1), granting Congress the power to remove the Comptroller for cause through joint resolution; therefore the Comptroller General may not constitutionally exercise the executive powers granted him in the Gramm-Rudman Act, and the Act's automatic budget-reduction mechanism, which is premised on the Comptroller's exercise of those powers, must be struck down.

Before examining the merits of the Court's argument, I wish to emphasize what it is that the Court quite pointedly and correctly does *not* hold: namely, that "executive" powers of the sort granted the Comptroller by the Act may only be exercised by officers removable at will by the President. The Court's apparent unwillingness to accept this argument,[1] which has been tendered in this Court by the Solicitor General,[2] is fully consistent with the Court's longstanding recognition that it is within the power of Congress under the "Necessary and Proper" Clause, Art. I, § 8, to vest authority that falls within the Court's definition of executive power in officers who are not subject to removal at will by the President and are therefore not under the President's direct control. See, *e. g.*, *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935); *Wiener* v. *United States*, 357 U. S. 349

---

[1] See *ante*, at 9–10, and n. 4.

[2] The Solicitor General appeared on behalf of the "United States," or, more properly, the Executive departments, which intervened to attack the constitutionality of the statute that the Chief Executive had earlier endorsed and signed into law.

(1958).[3] In an earlier day, in which simpler notions of the role of government in society prevailed, it was perhaps plausible to insist that all "executive" officers be subject to an unqualified presidential removal power, see *Myers* v. *United States*, 272 U. S. 52 (1926); but with the advent and triumph of the administrative state and the accompanying multiplication of the tasks undertaken by the Federal Government, the Court has been virtually compelled to recognize that Congress may reasonably deem it "necessary and proper" to vest some among the broad new array of governmental functions in officers who are free from the partisanship that may be expected of agents wholly dependent upon the President.

The Court's recognition of the legitimacy of legislation vesting "executive" authority in officers independent of the President does not imply derogation of the President's own constitutional authority—indeed, duty—to "take Care that the Laws be faithfully executed," Art. II, § 3, for any such duty is necessarily limited to a great extent by the content of the laws enacted by the Congress. As Justice Holmes put it, "The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power." *Myers* v. *United States*, 272 U. S., at 177 (Holmes, J., dissenting).[4] Justice Holmes perhaps overstated his case, for there are undoubtedly executive functions that, regardless of the enactments of Congress, must be performed by officers subject to removal at will by the President. Whether a particular function falls within this class or within the far larger class that may be relegated to independent officers "will depend upon the character of the office." *Humphrey's Executor*, 295 U. S., at 631. In determining whether a limitation on the President's power to remove an officer performing executive functions constitutes a violation of the constitutional scheme of separation of powers, a court must "focu[s] on the extent to which [such a limitation] prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 443 (1977). "Only where the potential for disruption is present must we then determine whether that impact is satisfied by an overriding need to promote objectives within the constitutional authority of Congress." *Ibid.* This inquiry is, to be sure, not one that will beget easy answers; it provides nothing approaching a bright-line rule or set of rules. Such an inquiry, however, is necessitated by the recognition that "formalistic and unbending rules" in the area of separation of powers may "unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers." *Commodity Futures Trading Commission* v. *Schor*, —— U. S. ——, —— (1986).

---

[3] Although the Court in *Humphrey's Executor* characterized the powers of the Federal Trade Commissioner whose tenure was at issue as "quasi-legislative" and "quasi-judicial," it is clear that the FTC's power to enforce and give content to the Federal Trade Commission Act's proscription of "unfair" acts and practices and methods of competition is in fact "executive" in the same sense as is the Comptroller's authority under Gramm-Rudman—that is, it involves the implementation, (or the interpretation and application) of an act of Congress. Thus, although the Court in *Humphrey's Executor* found the use of the labels "quasi-legislative" and "quasi-judicial" helpful in "distinguishing" its then-recent decision in *Myers* v. *United States*, 272 U. S. 52 (1926), these terms are hardly of any use in limiting the holding of the case; as Justice Jackson pointed out, "[t]he mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed." *FTC* v. *Ruberoid Co.*, 343 U. S. 470, 487–488 (Jackson, J., dissenting).

It is evident (and nothing in the Court's opinion is to the contrary) that the powers exercised by the Comptroller General under the Gramm-Rudman Act are not such that vesting them in an officer not subject to removal at will by the President would in itself improperly interfere with Presidential powers. Determining the level of spending by the Federal

---

[4] Cf. *ante*, at 18 ("undoubtedly the content of the Act determines the nature of the executive duty").

Government is not by nature a function central either to the exercise of the President's enumerated powers or to his general duty to ensure execution of the laws; rather, appropriating funds is a peculiarly legislative function, and one expressly committed to Congress by Art. I, § 9, which provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." In enacting Gramm-Rudman, Congress has chosen to exercise this legislative power to establish the level of federal spending by providing a detailed set of criteria for reducing expenditures below the level of appropriations in the event that certain conditions are met. Delegating the execution of this legislation—that is, the power to apply the Act's criteria and make the required calculations—to an officer independent of the President's will does not deprive the President of any power that he would otherwise have or that is essential to the performance of the duties of his office. Rather, the result of such a delegation, from the standpoint of the President, is no different from the result of more traditional forms of appropriation: under either system, the level of funds available to the Executive branch to carry out its duties is not within the President's discretionary control. To be sure, if the budget-cutting mechanism required the responsible officer to exercise a great deal of policymaking discretion, one might argue that having created such broad discretion Congress had some obligation based upon Art. II to vest it in the Chief Executive or his agents. In Gramm-Rudman, however, Congress has done no such thing; instead, it has created a precise and articulated set of criteria designed to minimize the degree of policy choice exercised by the officer executing the statute and to ensure that the relative spending priorities established by Congress in the appropriations it passes into law remain unaltered.[5] Given that the exercise of policy choice by the officer executing the statute would be inimical to Congress' goal in enacting "automatic" budget-cutting measures, it is eminently reasonable and proper for Congress to vest the budget-cutting authority in an officer who is to the greatest degree possible nonpartisan and independent of the President and his political agenda and who therefore may be relied upon not to allow his calculations to be colored by political considerations. Such a delegation deprives the President of no authority that is rightfully his.

---

[5] That the statute provides, to the greatest extent possible, precise guidelines for the officer assigned to carry out the required budget cuts not only indicates that vesting budget-cutting authority in an officer independ-

II

If, as the Court seems to agree, the assignment of "executive" powers under Gramm-Rudman to an officer not removable at will by the President would not in itself represent a violation of the constitutional scheme of separated powers, the question remains whether, as the Court concludes, the fact that the officer to whom Congress has delegated the authority to implement the Act is removable by a joint resolution of Congress should require invalidation of the Act. The Court's decision, as I have stated above, is based on a syllogism: the Act vests the Comptroller with "executive power"; such power may not be exercised by Congress or its agents; the Comptroller is an agent of Congress because he is removable by Congress; therefore the Act is invalid. I have no quarrel with the proposition that the powers exercised by the Comptroller under the Act may be characterized as "executive" in that they involve the interpretation and carrying out of the Act's mandate. I can also accept the general proposition that although Congress has considerable authority in

---

ent of the President does not in any sense deprive the President of a significant amount of discretionary authority that should rightfully be vested in him or an officer accountable to him, but also answers the claim that the Act represents an excessive and hence unlawful delegation of legislative authority. Because the majority does not address the delegation argument, I shall not discuss it at any length, other than to refer the reader to the District Court's persuasive demonstration that the statute is not void under the nondelegation doctrine.

designating the officers who are to execute legislation, see *supra*, at 3–7, the constitutional scheme of separated powers does prevent Congress from reserving an executive role for itself or for its "agents." *Buckley* v. *Valeo*, 424 U. S., at 120–141; *id.*, at 267–282 (WHITE, J., concurring in part and dissenting in part). I cannot accept, however, that the exercise of authority by an officer removable for cause by a joint resolution of Congress is analogous to the impermissible execution of the law by Congress itself, nor would I hold that the congressional role in the removal process renders the Comptroller an "agent" of the Congress, incapable of receiving "executive" power.

In *Buckley* v. *Valeo*, *supra*, the Court held that Congress could not reserve to itself the power to appoint members of the Federal Election Commission, a body exercising "executive" power. *Buckley*, however, was grounded on a textually based separation of powers argument whose central premise was that the Constitution requires that all "Officers of the United States" (defined as "all persons who can be said to hold an office under the government," 424 U. S., at 126) whose appointment is not otherwise specifically provided for elsewhere in its text be appointed through the means specified by the Appointments Clause, Art. II, §2, cl.2—that is, either by the President with the advice and consent of the Senate or, if Congress so specifies, by the President alone, by the courts, or by the head of a department. The *Buckley* Court treated the Appointments Clause as reflecting the principle that "the Legislative Branch may not exercise executive authority," 424 U. S., at 119 (citing *Springer* v. *Philippine Islands*, 277 U. S. 189 (1928)), but the Court's holding was merely that Congress may not direct that its laws be implemented through persons who are its agents in the sense that it chose them; the Court did not pass on the legitimacy of other means by which Congress might exercise authority over those who execute its laws. Because the Comptroller is not an appointee of Congress but an officer of the United

States appointed by the President with the advice and consent of the Senate, *Buckley* neither requires that he be characterized as an agent of the Congress nor in any other way calls into question his capacity to exercise "executive" authority. See 424 U. S., at 128, n. 165.

As the majority points out, however, the Court's decision in *INS* v. *Chadha*, 462 U. S. 919 (1983), recognizes additional limits on the ability of Congress to participate in or influence the execution of the laws. As interpreted in *Chadha*, the Constitution prevents Congress from interfering with the actions of officers of the United States through means short of legislation satisfying the demands of bicameral passage and presentment to the President for approval or disapproval. *Id.*, at 954–955. Today's majority concludes that the same concerns that underlay *Chadha* indicate the invalidity of a statutory provision allowing the removal by joint resolution for specified cause of any officer performing executive functions. Such removal power, the Court contends, constitutes a "congressional veto" analogous to that struck down in *Chadha*, for it permits Congress to "remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory." *Ante*, at 11. The Court concludes that it is "[t]his kind of congressional control over the execution of the laws" that *Chadha* condemns. *Ibid.*

The deficiencies in the Court's reasoning are apparent. First, the Court baldly mischaracterizes the removal provision when it suggests that it allows Congress to remove the Comptoller for "executing the laws in any fashion found to be unsatisfactory"; in fact, Congress may remove the Comptroller only for one or more of five specified reasons, which "although not so narrow as to deny Congress any leeway, circumscribe Congress' power to some extent by providing a basis for judicial review of congressional removal." *Ameron, Inc.* v. *United States Army Corps of Engineers*, 787 F. 2d 875, 895 (CA3 1986) (Becker, J., concurring in part). Second, and more to the point, the Court overlooks or deliberately ignores the decisive difference between the congressional removal provision and the legislative veto struck down in *Chadha:* under the Budget and Accounting Act, Congress may remove the Comptroller only through a joint resolution, which by definition must be passed by both Houses and signed by the President. See *United States* v. *California*, 332 U. S. 19, 28 (1947).[6] In other words, a removal of the Comptroller under the statute *satisfies the requirements of bicameralism and presentment laid down in Chadha.* The majority's citation of *Chadha* for the proposition that Congress may only control the acts of officers of the United States "by passing new legislation," *ante*, at 18, in no sense casts doubt on the legitimacy of the removal provision, for that provision allows Congress to effect removal only through action that constitutes legislation as defined in *Chadha*.

To the extent that it has any bearing on the problem now before us, *Chadha* would seem to suggest the legitimacy of the statutory provision making the Comptroller removable through joint resolution, for the Court's opinion in *Chadha* reflects the view that the bicameralism and presentment requirements of Art. I represent the principal assurances that Congress will remain within its legislative role in the constitutionally prescribed scheme of separated powers. Action taken in accordance with the "single, finely wrought, and exhaustively considered, procedure" established by Art. I,

---

[6] The legislative history indicates that the inclusion of the President in the removal process was a deliberate choice on the part of the Congress that enacted the Budget and Accounting Act. The previous year, legislation establishing the position of Comptroller General and providing for removal by *concurrent* resolution—that is, by a resolution not presented to the President—had been vetoed by President Wilson on the ground that granting the sole power of removal to the Congress would be unconstitutional. See 59 Cong. Rec. 8609–8610 (1920). That Congress responded by providing for removal through joint resolution clearly evinces congressional intent that removal take place only through the legislative process, with Presidential participation.

Chadha, 462 U. S., at 951, should be presumptively viewed as a legitimate exercise of legislative power. That such action may represent a more or less successful attempt by Congress to "control" the actions of an officer of the United States surely does not in itself indicate that it is unconstitutional, for no one would dispute that Congress has the power to "control" administration through legislation imposing duties or substantive restraints on executive officers, through legislation increasing or decreasing the funds made available to such officers, or through legislation actually abolishing a particular office. Indeed, *Chadha* expressly recognizes that while congressional meddling with administration of the laws outside of the legislative process is impermissible, congressional control over executive officers exercised through the legislative process is valid. 462 U. S., at 955, n. 19. Thus, if the existence of a statute permitting removal of the Comptroller through joint resolution (that is, through the legislative process) renders his exercise of executive powers unconstitutional, it is for reasons having virtually nothing to do with *Chadha*.[7]

---

[7] Because a joint resolution passed by both Houses of Congress and signed by the President (or repassed over the President's veto) is legislation having the same force as any other Act of Congress, it is somewhat mysterious why the Court focuses on the Budget and Accounting Act's authorization of removal of the Comptroller through such a resolution as an indicator that the Comptroller may not be vested with executive powers. After all, even without such prior statutory authorization, Congress could pass, and the President sign, a joint resolution purporting to remove the Comptroller, and the validity of such legislation would seem in no way dependent on previous legislation contemplating it. Surely the fact that Congress might at any time pass and the President sign legislation purporting to remove some officer of the United States does not make the exercise of executive power by all such officers unconstitutional. Since the effect of the Budget and Accounting Act is merely to recognize the possibility of legislation that Congress might at any time attempt to enact with respect to any executive officer, it should not make the exercise of "executive" power by the Comptroller any more problematic than the exercise of such power by any other officer. A joint resolution purporting to remove

That a joint resolution removing the Comptroller General would satisfy the requirements for legitimate legislative action laid down in *Chadha* does not fully answer the separation of powers argument, for it is apparent that even the results of the constitutional legislative process may be unconstitutional if those results are in fact destructive of the scheme of separation of powers. *Nixon* v. *Administrator of General Services*, 433 U. S. 425 (1977). The question to be answered is whether the threat of removal of the Comptroller General for cause through joint resolution as authorized by the Budget and Accounting Act renders the Comptroller sufficiently subservient to Congress that investing him with "executive" power can be realistically equated with the unlawful retention of such power by Congress itself; more generally, the question is whether there is a genuine threat of "encroachment or aggrandizement of one branch at the expense of the other," *Buckley* v. *Valeo*, 424 U. S., at 122. Common sense indicates that the existence of the removal provision poses no such threat to the principle of separation of powers.

---

the Comptroller, or any other executive officer, might be constitutionally infirm, but Congress' advance assertion of the power to enact such legislation seems irrelevant to the question whether exercise of authority by an officer who might in the future be subject to such a possibly valid and possibly invalid resolution is permissible, since the provision contemplating a resolution of removal obviously cannot in any way add to Congress' power to enact such a resolution.

Of course, the foregoing analysis does not imply that the removal provision of the Budget and Accounting Act is meaningless; for although that provision cannot *add to* any power Congress might have to pass legislation (that is, a joint resolution) removing the Comptroller, it can *limit* its power to do so to the circumstances specified. The reason for this is that any joint resolution purporting to remove the Comptroller in the absence of a hearing or one of the specified grounds for removal would not be deemed an implied repeal of the limits on removal in the 1921 Act (for such implied repeals are disfavored), and thus the joint resolution would only be given effect to the extent consistent with the preexisting law (that is, to the extent that there was actually cause for removal).

The statute does not permit anyone to remove the Comptroller at will; removal is permitted only for specified cause, with the existence of cause to be determined by Congress following a hearing. Any removal under the statute would presumably be subject to post-termination judicial review to ensure that a hearing had in fact been held and that the finding of cause for removal was not arbitrary. See *Ameron, Inc.* v. *United States Army Corps of Engineers*, 787 F. 2d, at 895 (Becker, J., concurring in part).[8] These procedural and substantive limitations on the removal power militate strongly against the characterization of the Comptroller as a mere agent of Congress by virtue of the removal authority. Indeed, similarly qualified grants of removal power are generally deemed to protect the officers to whom they apply and to establish their independence from the domination of the possessor of the removal power. See *Humphrey's Executor* v. *United States*, 295 U. S., at 625–626, 629–630. Removal authority limited in such a manner is more properly viewed as motivating adherence to a substantive standard established by law than as inducing subservience to the particular institution that enforces that standard. That the agent enforcing the standard is Congress may be of some significance to the Comptroller, but Congress' substantively limited removal power will undoubtedly be less of a spur to subservience than Congress' unquestionable and unqualified power to enact legislation reducing the Comptroller's salary, cutting the funds available to his department, reducing his personnel, limiting or expanding his duties, or even abolishing his position altogether.

More importantly, the substantial role played by the President in the process of removal through joint resolution reduces to utter insignificance the possibility that the threat of removal will induce subservience to the Congress. As I have pointed out above, a joint resolution must be presented to the President and is ineffective if it is vetoed by him, unless the veto is overridden by the constitutionally prescribed two-thirds majority of both Houses of Congress. The requirement of presidential approval obviates the possibility that the Comptroller will perceive himself as so completely at the mercy of Congress that he will function as its tool.[9] If the Comptroller's conduct in office is not so unsatisfactory to the President as to convince the latter that removal is required under the statutory standard, Congress will have no independent power to coerce the Comptroller unless it can muster a two-thirds majority in both Houses—a feat of bipartisanship more difficult than that required to impeach and convict. The incremental *in terrorem* effect of the possibility of congressional removal in the face of a presidential veto is therefore exceedingly unlikely to have any discernible impact on the extent of congressional influence over the Comptroller.[10]

---

[8] Cf. *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), in which the Court entertained a challenge to Presidential removal under a statute that similarly limited removals to specified cause.

---

[9] The Court cites statements made by supporters of the Budget and Accounting Act indicating their belief that the Act's removal provisions would render the Comptroller subservient to Congress by giving Congress "absolute control of the man's destiny in office." *Ante*, at 13. The Court's scholarship, however, is faulty: at the time all of these statements were made—including Representative Sisson's statement of May 3, 1921—the proposed legislation provided for removal by concurrent resolution, with no Presidential role. See 61 Cong. Rec. 983, 989–992, 1079–1085 (1921).

[10] Concededly, the substantive grounds for removal under the statute are broader than the grounds for impeachment specified by the Constitution, see *ante*, at 13–14, although given that it is unclear whether the limits on the impeachment power may be policed by any body other than Congress itself, the practical significance of the difference is hard to gauge. It seems to me most likely that the difficulty of obtaining a two-thirds vote for removal in both Houses would more than offset any increased likelihood of removal that might result from the greater liberality of the substantive grounds for removal under the statute. And even if removal by Congress alone through joint resolution passed over presidential veto is marginally more likely than impeachment, whatever additional influence over the Comptroller Congress may thereby possess seems likely to be minimal in relation to that which Congress already possesses by virtue of its general

The practical result of the removal provision is not to render the Comptroller unduly dependent upon or subservient to Congress, but to render him one of the most independent officers in the entire federal establishment. Those who have studied the office agree that the procedural and substantive limits on the power of Congress and the President to remove the Comptroller make dislodging him against his will practically impossible. As one scholar put it nearly fifty years ago, "Under the statute the Comptroller General, once confirmed, is safe so long as he avoids a public exhibition of personal immorality, dishonesty, or failing mentality." H.

---

legislative powers and its power to impeach. Of course, if it were demonstrable that the Constitution specifically limited Congress' role in removal to the impeachment process, the insignificance of the marginal increase in congressional influence resulting from the provision authorizing removal through joint resolution would be no answer to a claim of unconstitutionality. But no such limit appears in the Constitution: the Constitution merely provides that all officers of the United States may be impeached for high crimes and misdemeanors, and nowhere suggests that impeachment is the sole means of removing such officers.

As for the Court's observation that "no one would seriously suggest that judicial independence would be strengthened by allowing removal of federal judges only by a joint resolution finding 'inefficiency,' 'neglect of duty,' or 'malfeasance,'" *ante*, at 14, it can only be described as a *non sequitur*. The issue is not whether the removal provision makes the Comptroller *more* independent than he would be if he were removable only through impeachment, but whether the provision so weakens the Comptroller that he may not exercise executive authority. Moreover, the Court's reference to standards applicable to removal of Art. III judges is a red herring, for Art. III judges—unlike other officers of the United States—are specifically protected against removal for other than constitutionally specified cause. Thus, the infirmity of a statute purporting to allow removal of judges for some other reason would be that it violated the specific command of Art. III. In the absence of a similar textual limit on the removal of nonjudicial officers, the test for a violation of separation of powers should be whether an asserted congressional power to remove would constitute a real and substantial aggrandizement of congressional authority at the expense of executive power, not whether a similar removal provision would appear problematic if applied to federal judges.

Mansfield, The Comptroller General 75–76 (1939).[11] The passage of time has done little to cast doubt on this view: of the six Comptrollers who have served since 1921, none has been threatened with, much less subjected to, removal. Recent students of the office concur that "[b]arring resignation, death, physical or mental incapacity, or extremely bad behavior, the Comptroller General is assured his tenure if he wants it, and not a day more." F. Mosher, The GAO 242 (1979).[12] The threat of "here-and-now subservience," *ante*, at 5, is obviously remote indeed.[13]

---

[11] The author of this statement was no apologist for the Comptroller; rather, his study of the office is premised on the desirability of presidential control over many of the Comptroller's functions. Nonetheless, he apparently found no reason to accuse the Comptroller of subservience to Congress, and he conceded that "[t]he political independence of the office has in fact been one of its outstanding characteristics." H. Mansfield, The Comptroller General 75 (1939).

[12] Professor Mosher's reference to the fact that the Comptroller is limited to a single term highlights an additional source of independence: unlike an officer with a fixed term who may be reappointed to office, the Comptroller need not concern himself with currying favor with the Senate in order to secure its consent to his reappointment.

[13] The majority responds to the facts indicating the practical independence of the Comptroller from congressional control by cataloguing a series of statements and materials categorizing the Comptroller as a part of the "Legislative Branch." *Ante*, at 14–16. Such meaningless labels are quite obviously irrelevant to the question whether in actuality the Comptroller is so subject to congressional domination that he may not participate in the execution of the laws.

JUSTICE STEVENS, for his part, finds that the Comptroller is an "agent" of Congress, and thus incapable of wielding the authority granted him by the Act, because his responsibilities under a variety of statutes include making reports to the Congress. JUSTICE STEVENS' position is puzzling, to say the least. It seems to rest on the view that an officer required to perform certain duties for the benefit of Congress somehow becomes a part of Congress for all purposes. But it is by no means true that an officer who must perform specified duties for some other body is under that body's control or acts as its agent when carrying out other, unrelated duties. As JUSTICE BLACKMUN points out, see *post*, at 4, n. 1, duties toward Congress are imposed on a variety of agencies, including the Federal Trade

Realistic consideration of the nature of the Comptroller General's relation to Congress thus reveals that the threat to separation of powers conjured up by the majority is wholly chimerical. The power over removal retained by the Congress is not a power that is exercised outside the legislative process as established by the Constitution, nor does it appear likely that it is a power that adds significantly to the influence Congress may exert over executive officers through other, undoubtedly constitutional exercises of legislative power and through the constitutionally guaranteed impeachment power. Indeed, the removal power is so constrained by its own substantive limits and by the requirement of presidential approval "that, as a practical matter, Congress has not exercised, and probably will never exercise, such control over the Comptroller General that his non-legislative powers will threaten the goal of dispersion of power, and hence the goal of individual liberty, that separation of powers serves." *Ameron, Inc.* v. *United States Army Corps of Engineers*, 787 F. 2d, at 895 (Becker, J., concurring in part).[14]

Commission; and certainly it cannot credibly be maintained that by virtue of those duties the agencies become branches of Congress, incapable of wielding governmental power except through the legislative process. Indeed, the President himself is under numerous obligations, both statutory and constitutional, to provide information to Congress, see, *e. g.*, Art. II, § 3, cl. 1; surely the President is not thereby transformed into an arm or agency of the Congress. If, therefore, as JUSTICE STEVENS' concedes, see *ante*, at 2–5, the provision authorizing removal of the Comptroller by joint resolution does not suffice to establish that he may not exercise the authority granted him under Gramm-Rudman, I see no substantial basis for concluding that his various duties toward Congress render him incapable of receiving such power.

[14] Even if I were to concede that the exercise of executive authority by the Comptroller is inconsistent with the removal provision, I would agree with JUSTICE BLACKMUN that striking down the provisions of the Gramm-Rudman Act vesting the Comptroller with such duties is a grossly inappropriate remedy for the supposed constitutional infirmity, and that if one of the features of the statutory scheme must go, it should be the removal provision. As JUSTICE BLACKMUN points out, the mere fact that the parties

The majority's contrary conclusion rests on the rigid dogma that, outside of the impeachment process, any "direct congressional role in the removal of officers charged with the execution of the laws . . . is inconsistent with separation of powers." *Ante*, at 7. Reliance on such an unyielding principle to strike down a statute posing no real danger of aggrandizement of congressional power is extremely misguided and insensitive to our constitutional role. The wisdom of vesting "executive" powers in an officer removable by joint resolution may indeed be debatable—as may be the wisdom of the entire scheme of permitting an unelected official to revise the budget enacted by Congress—but such matters are for the most part to be worked out between the Congress and the

---

before the Court have standing only to seek invalidation of the Gramm-Rudman spending limits cannot dictate that the Court resolve any constitutional incompatibility by striking down Gramm-Rudman. Nor does the existence of the fallback provisions in Gramm-Rudman indicate the appropriateness of the Court's choice, for those provisions, by their terms, go into effect only if the Court finds that the primary budget-cutting mechanism established by the Act must be invalidated; they by no means answer the antecedent question whether the Court should take that step.

Given the majority's constitutional premises, it is clear to me that the decision whether to strike down Gramm-Rudman must depend on whether such a choice would be more or less disruptive of congressional objectives than declaring the removal provision invalid (with the result that the Comptroller would still be protected against removal at will by the President, but could also not be removed through joint resolution). When the choice is put in these terms, it is evident that it is the never-used removal provision that is far less central to the overall statutory scheme. That this is so is underscored by the fact that under the majority's theory, the removal provision was *never* constitutional, as the Comptroller's primary duties under the 1921 Act were clearly executive under the Court's definition: the Comptroller's most important tasks under that legislation were to dictate accounting techniques for all executive agencies, to audit all federal expenditures, and to approve or disapprove disbursement of funds. See F. Mosher, The GAO (1979). Surely the Congress in 1921 would have sacrificed its own role in removal rather than allow such duties to go unfulfilled by a Comptroller independent of the President. See 59 Cong. Rec. 8611 (1920).

President through the legislative process, which affords each branch ample opportunity to defend its interests. The Act vesting budget-cutting authority in the Comptroller General represents Congress' judgment that the delegation of such authority to counteract ever-mounting deficits is "necessary and proper" to the exercise of the powers granted the Federal Government by the Constitution; and the President's approval of the statute signifies his unwillingness to reject the choice made by Congress. Cf. *Nixon* v. *Administrator of General Services*, 433 U. S., at 441. Under such circumstances, the role of this Court should be limited to determining whether the Act so alters the balance of authority among the branches of government as to pose a genuine threat to the basic division between the lawmaking power and the power to execute the law. Because I see no such threat, I cannot join the Court in striking down the Act.

I dissent.

SUPREME COURT OF THE UNITED STATES

Nos. 85-1377, 85-1378 AND 85-1379

CHARLES A. BOWSHER, COMPTROLLER GENERAL
OF THE UNITED STATES, APPELLANT
85-1377 *v.*
MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

UNITED STATES SENATE, APPELLANT
85-1378 *v.*
MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED
STATES HOUSE OF REPRESENTATIVES,
ET AL., APPELLANTS
85-1379 *v.*
MIKE SYNAR, MEMBER OF
CONGRESS, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[July 7, 1986]

JUSTICE BLACKMUN, dissenting.

The Court may be correct when it says that Congress cannot constitutionally exercise removal authority over an official vested with the budget-reduction powers that § 251 of the Balanced Budget and Emergency Deficit Control Act of 1985 gives to the Comptroller General. This, however, is not because "[t]he removal powers over the Comptroller General's office dictate that he will be subservient to Congress," *ante*, at 14; I agree with JUSTICE WHITE that any such claim is unrealistic. Furthermore, I think it is clear under *Humphrey's*

Executor v. *United States*, 295 U. S. 602 (1935), that "executive" powers of the kind delegated to the Comptroller General under the Deficit Control Act need not be exercised by an officer who serves at the President's pleasure; Congress certainly could prescribe the standards and procedures for removing the Comptroller General. But it seems to me that an attempt by Congress to participate *directly* in the removal of an executive officer—other than through the constitutionally prescribed procedure of impeachment—might well violate the principle of separation of powers by assuming for Congress part of the President's constitutional responsibility to carry out the laws.

In my view, however, that important and difficult question need not be decided in this case, because no matter how it is resolved the plaintiffs, now appellees, are not entitled to the relief they have requested. Appellees have not sought invalidation of the 1921 provision that authorizes Congress to remove the Comptroller General by joint resolution; indeed, it is far from clear they would have standing to request such a judgment. The only relief sought in this case is nullification of the automatic budget-reduction provisions of the Deficit Control Act, and that relief should not be awarded even if the Court is correct that those provisions are constitutionally incompatible with Congress' authority to remove the Comptroller General by joint resolution. Any incompatibility, I feel, should be cured by refusing to allow congressional removal—if it ever is attempted—and not by striking down the central provisions of the Deficit Control Act. However wise or foolish it may be, that statute unquestionably ranks among the most important federal enactments of the past several decades. I cannot see the sense of invalidating legislation of this magnitude in order to preserve a cumbersome, 65-year-old removal power that has never been exercised and appears to have been all but forgotten until this litigation.[1]

---

[1] For the reasons identified by the District Court, I agree that the Deficit Control Act does not violate the nondelegation doctrine. See 626 F. Supp. 1374, 1382–1391 (DC 1986).

I

The District Court believed it had no choice in this matter. Once it concluded that the Comptroller General's functions

---

JUSTICE STEVENS concludes that the delegation effected under § 251 contravenes the holding of *INS* v. *Chadha*, 462 U. S. 919 (1983), that Congress may make law only "in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President." *Id.*, at 958. I do not agree. We made clear in *Chadha* that the bicameralism and presentation requirements prevented Congress from *itself* exercising legislative power through some kind of procedural shortcut, such as the one-House veto challenged in that case. But we also made clear that our holding in no way questioned "Congress' authority to delegate portions of its power to administrative agencies." *Id.*, at 953-954, n. 16. We explained: "Executive action under legislatively delegated authority that might resemble 'legislative' action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require. That kind of Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely." *Ibid.*

Although JUSTICE STEVENS seems to agree that the duties delegated to the Comptroller General under § 251 could be assigned constitutionally to an independent administrative agency, he argues that Congress may not give these duties "to one of its own agents." *Ante*, at 17-18. He explains that the Comptroller General fits this description because "most" of his statutory responsibilities require him to provide services to Congress, and because Congress has repeatedly referred to the Comptroller General as part of the Legislative Branch. See *ante*, at 6-11. "If Congress were free to delegate its policymaking authority" to such an officer, JUSTICE STEVENS contends that "it would be able to evade 'the carefully crafted restraints spelled out in the Constitution.'" *Ante*, at 20, quoting *Chadha*, 462 U. S., at 959. In his view, "[t]hat danger—congressional action that evades constitutional restraints—is not present when Congress delegates lawmaking power to the executive or to an independent agency." *Ante*, at 20.

I do not think that danger is present here, either. The Comptroller General is not Congress, nor is he a part of Congress; "irrespective of Congress' designation," he is an officer of the United States, appointed by the President. *Buckley* v. *Valeo*, 424 U. S. 1, 128, n. 165 (1976). In this respect the Comptroller General differs critically from, for example, the Director of the Congressional Budget Office, who is appointed by Congress, under the Deficit Control Act were constitutionally incompatible with the 1921 removal provision, the District Court considered itself bound as a matter of orderly judicial procedure to set aside the statute challenged by the plaintiffs. See 626 F. Supp. 1374, 1393 (DC 1986). The majority today does not take this view, and I believe it is untenable.

Under the District Court's approach, everything depends on who first files suit. Because Representative Synar and the plaintiffs who later joined him in this case objected to budget cuts made pursuant to the Deficit Control Act, the District Court struck down that statute, while retaining the 1921 removal provision. But if the Comptroller General had filed suit 15 minutes before the Congressman did, seeking a declaratory judgment that the 1921 removal power could not constitutionally be exercised in light of the duties delegated

---

see 2 U. S. C. § 601(a)(2), and hence may not "exercis[e] significant authority pursuant to the laws of the United States," *Buckley* v. *Valeo*, *supra*, at 126; see U. S. Const., Art. II, § 2, cl. 2. The exercise of rulemaking authority by an independent agency such as the Federal Trade Commission does not offend *Chadha*, even though the Commission could be described as an "agent" of Congress because it "carr[ies] into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed." *Humphrey's Executor* v. *United States*, 295 U. S. 602, 628 (1935). I do not see why the danger of "congressional action that evades constitutional restraints" becomes any more pronounced when a statute delegates power to a presidentially appointed agent whose primary duties require him to provide services to Congress. The impermissibility of such a delegation surely is not rendered "obvious" by the fact that some officers who perform services for Congress have titles such as "librarian," "architect," or "printer." See *ante*, at 23, n. 25 (STEVENS, J., concurring in judgment). Furthermore, in sustaining the constitutionality of the Federal Trade Commission's independent status, this Court noted specifically that the Commission "acts as a legislative agency" in "making investigations and reports thereon for the information of Congress . . . in aid of the legislative power." *Ibid.* JUSTICE STEVENS' approach might make some sense if Congress had delegated legislative responsibility to an officer over whom Congress could hope to exercise tight control, but even JUSTICE STEVENS does not claim that the Comptroller General is such an officer.

to the Comptroller General in 1985, the removal provision presumably would have been invalidated, and the Deficit Control Act would have survived intact. Momentous issues of public law should not be decided in so arbitrary a fashion. In my view, the only sensible way to choose between two conjunctively unconstitutional statutory provisions is to determine which provision can be invalidated with the least disruption of congressional objectives.

The District Court apparently thought differently in large part because it believed this Court had never undertaken such analysis in the past; instead, according to the District Court, this Court "has set aside that statute which either allegedly prohibits or allegedly authorizes the injury-in-fact that confers standing upon the plaintiffs." 626 F. Supp., at 1393. But none of the four cases the District Court cited for this proposition discussed the problem of choice of remedy, and in none of them could a strong argument have been made that invalidating the other of the inconsistent statutory provisions would have interfered less substantially with legislative goals or have been less disruptive of governmental operations.[2]

---

[2] In *Myers* v. *United States*, 272 U. S. 52 (1926), the Court refused to enforce a statute requiring congressional approval for removal of postmasters. The Court's analysis suggested that there was no practical way the duties of the office could have been reformulated to render congressional participation in the removal process permissible. In *Springer* v. *Philippine Islands*, 277 U. S. 189 (1928), the Court removed from office several Philippine officials exercising executive powers but appointed by officers of the Philippine Legislature. As in *Myers*, the Court concluded that the offices by their very nature were executive, so the appointments could not have been rendered legal simply by trimming the delegated duties. In *Buckley* v. *Valeo*, 424 U. S. 1 (1976), the Court set aside Federal Election Campaign Act provisions granting certain powers to officials appointed by Congress, but it structured its remedy so as to interefere as little as possible with the orderly conduct of business by the Federal Election Commission. Past acts of the improperly constituted Commission were deemed valid, and the Court's mandate was stayed for 30 days to allow time for the Commission to be reconstituted through presidential ap-

More importantly, the District Court ignored what appears to be the only separation-of-powers case in which this Court *did* expressly consider the question as to which of two incompatible statutes to invalidate: *Glidden Co.* v. *Zdanok*, 370 U. S. 530 (1962). The petitioners in that case had received unfavorable rulings from judges assigned to temporary duty in the District Court or Court of Appeals from the Court of Claims or the Court of Customs and Patent Appeals; they argued that those rulings should be set aside because the judges from the specialized courts did not enjoy the tenure and compensation guaranteed by Article III of the Constitution. Before the assignments, Congress had pronounced the Court of Claims and the Court of Customs and Patent Appeals to be Article III courts, implying that judges on those courts were entitled to Article III benefits. Older statutes, however, gave both courts authority to issue advisory opinions, an authority incompatible with Article III status. *Glidden* held that the Court of Claims and the Court of Customs and Patent Appeals were indeed Article III tribunals. With respect to the advisory opinion jurisdiction, Justice Harlan's opinion for the plurality noted: "The overwhelming majority of the Court of Claims' business is composed of cases and controversies." 370 U. S., at 583. Since "it would be . . . perverse to make the status of these courts turn upon so minuscule a portion of their purported functions," Justice Harlan reasoned that, "if necessary, the particular offensive jurisdiction, and not the courts, would fall." *Ibid.* Justice Clark's concurring opinion for himself and the Chief Justice similarly concluded that the "minuscule" advisory-opinion jurisdiction of the courts in question would have to bow to the

---

pointment. See *id.*, at 142–143. Finally, in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50 (1982), the Court set aside an exercise of judicial power by a bankruptcy judge, because his tenure was not protected in the manner required by Article III of the Constitution. To give Article III protections to bankruptcy judges, the federal bankruptcy statute would have had to be rewritten completely.

Article III status clearly proclaimed by Congress, and not vice versa. *Id.*, at 587–589.

The Court thus recognized in *Glidden* that it makes no sense to resolve the constitutional incompatibility between two statutory provisions simply by striking down whichever provision happens to be challenged first. A similar recognition has underlain the Court's approach in equal protection cases concerning statutes that create unconstitutionally circumscribed groups of beneficiaries. The Court has noted repeatedly that such a defect may be remedied in either of two ways: the statute may be nullified, or its benefits may be extended to the excluded class. See, *e. g.*, *Heckler* v. *Mathews*, 465 U. S. 728, 738 (1984); *Califano* v. *Westcott*, 443 U. S. 76, 89 (1979). Although extension is generally the preferred alternative, we have instructed lower courts choosing between the two remedies to "'measure the intensity of [legislative] commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.'" *Heckler* v. *Mathews*, *supra*, at 739, n. 5, quoting *Welsh* v. *United States*, 398 U. S. 333, 365 (1970) (Harlan, J., concurring in result). Calculations of this kind are obviously more complicated when a court is faced with two different statutes, enacted decades apart, but *Glidden* indicates that even then the task is judicially manageable. No matter how difficult it is to determine which remedy would less obstruct congressional objectives, surely we should make that determination as best we can instead of leaving the selection to the litigants.

II

Assuming that the Comptroller General's functions under § 251 of the Deficit Control Act cannot be exercised by an official removable by joint resolution of Congress, we must determine whether legislative goals would be frustrated more by striking down § 251 or by invalidating the 1921 removal provision. That question is not answered by the "fallback" provisions of the 1985 Act, which take effect "[i]n the event that any of the reporting procedures described in section 251 [of the Act] are invalidated." § 274(f)(1), 99 Stat. 1100. The question is whether the reporting procedures should be invalidated in the first place. The fallback provisions simply make clear that Congress would prefer a watered-down version of the Deficit Control Act to none at all; they provide no evidence that Congress would rather settle for the watered-down version than surrender its statutory authority to remove the Comptroller General. The legislative history of the Deficit Control Act contains no mention of the 1921 statute, and both Houses of Congress have argued in this Court that, if necessary, the removal provision should be invalidated rather than § 251. See Brief for Appellant United State Senate 31–43; Brief for Appellants Speaker and Bipartisan Leadership Group of the United States House of Representatives 49; accord, Brief for Appellant Comptroller General 33–47. To the extent that the absence of express fallback provisions in the 1921 statute signifies anything, it appear to signify only that, if the removal provision were invalidated, Congress preferred simply that the remainder of the statute should remain in effect without alteration.[3]

In the absence of express statutory direction, I think it is plain that, as both Houses urge, invalidating the Comptroller General's functions under the Deficit Control Act would frustrate congressional objectives far more seriously than would refusing to allow Congress to exercise its removal authority under the 1921 law. The majority suggests that the removal authority plays an important role in furthering Congress' desire to keep the Comptroller General under its control. But as JUSTICE WHITE demonstrates, see *ante*, at 13-16, the removal provision serves feebly for such purposes, especially in comparison to other, more effective means of supervision at Congress' disposal. Unless Congress institutes impeachment proceedings—a course all agree the Constitution would permit—the 1921 law authorizes Congress to remove the Comptroller General only for specified cause, only after a hearing, and only by passing the procedural equivalent of a new public law. Congress has never attempted to use this cumbersome procedure, and the Comptroller General has shown few signs of subservience.[4] If Congress in 1921 wished to make the Comptroller General its lackey, it did a remarkably poor job.

---

[3] Although the legislative history on this point is sparse, it seems reasonably clear that Congress intended the removal provision to be severable from the remainder of the 1921 statute. An earlier bill, providing for removal of the Comptroller General only by impeachment or concurrent resolution of Congress, was vetoed by President Wilson on the grounds that Congress could not constitutionally limit the President's removal power or exercise such power on its own. See 59 Cong. Rec. 8609–8610 (1920). In the course of an unsuccessful attempt to override the veto, Representative Pell inquired: "If we pass this over the President's veto and then the Supreme Court should uphold the contention of the President, this bill would not fail, would it? The bill would continue." Representative Blanton answered, "Certainly." *Id.*, at 8611.

Indeed, there is little evidence that Congress as a whole was very concerned in 1921—much less in 1985 or during the intervening decades—with its own ability to control the Comptroller General. The committee reports on the 1921 Act and its predecessor bills strongly suggest that what was critical to the legislators was not the Comptroller General's subservience to Congress, but rather his independence from the President. See, *e. g.*, H. R. Rep. No. 14, 67th Cong., 1st Sess., 7–8 (1921); H. R. Rep. No. 1044, 66th Cong., 2d Sess., 13 (1920); S. Rep. No. 524, 66th Cong., 2d Sess., 6–7 (1920); H. R. Rep. No. 362, 66th Cong., 1st Sess., 8–9 (1919). The debates over the Deficit Control Act contain no suggestion that the Comptroller General was chosen for the tasks outlined in § 251 because Congress thought it could count on him to do its will; instead, the Comptroller General appears to have been selected precisely because of his independence from both the Legislature and the Executive. By assigning the reporting functions to the Comptroller General, rather than to the Congressional Budget Office or to the Office of Management and Budget, Congress sought to create "a wall . . . that takes these decisions out of the hands of the President *and the Congress*." 131 Cong. Rec. H9846 (Nov. 6, 1985) (remarks of Rep. Gephardt) (emphasis added); see also, *e. g.*, *id.*, at H11894 (Dec. 11, 1985) (remarks of Rep. Weiss); *id.*, at E5622 (Dec. 12, 1985) (remarks of Rep. Bedell).

---

[4] "All of the comptrollers general have treasured and defended the independence of their office, not alone from the president but also from the Congress itself. . . . Like the other institutions in the government, GAO depends upon Congress for its powers, its resources, and its general oversight. But it also possesses continuing legal powers, of both long and recent standing, that Congress has granted it and that it can exercise in a quite independent fashion. And the comptroller general, realistically speaking, is immune from removal during his fifteen-year term for anything short of a capital crime, a crippling illness, or insanity." F. Mosher, A Tale of Two Agencies 158 (1984). See also, *e. g.*, *Ameron, Inc.* v. *U. S. Army Corps of Engineers*, 787 F. 2d 875, 885-887 (CA3 1986); F. Mosher, The GAO 2, 240-244 (1979); H. Mansfield, The Comptroller General 75-76 (1939).

Of course, the Deficit Control Act was hardly the first statute to assign new functions to the Comptroller General; a good number of other duties have been delegated to the Comptroller General over the years. But there is no reason to believe that, in effecting these earlier delegations, Congress relied any more heavily on the availability of the removal provision than it did in passing the Deficit Control Act. In the past, as in 1985, it is far more likely that Congress was concerned mainly with the Comptroller General's demonstrated political independence, and perhaps to a lesser extent with his long tradition of service to the Legislative Branch; neither of these characteristics depends to any significant extent on the ability of Congress to remove the Comptroller General without instituting impeachment proceedings. Striking down the congressional-removal provision might marginally frustrate the legislative expectations underlying some grants of authority to the Comptroller General, but surely to a lesser extent than would invalidation of § 251 of Gramm-Rudman—along with all other "executive" powers delegated to the Comptroller General over the years.[5]

I do not claim that the 1921 removal provision is a piece of statutory deadwood utterly without contemporary significance. But it comes close. Rarely if ever invoked even for symbolic purposes, the removal provision certainly pales in importance beside the legislative scheme the Court strikes down today—an extraordinarily far-reaching response to a deficit problem of unprecedented proportions. Because I believe that the constitutional defect found by the Court cannot justify the remedy it has imposed, I respectfully dissent.

---

[5] Many of the Comptroller General's other duties, including those listed by the majority, see *ante*, at 19, n. 9, appear to meet the majority's test for plainly "executive" functions—*i. e.*, they require the Comptroller General to "[i]nterpre[t] a law enacted by Congress to implement the legislative mandate," and to "exercise judgment concerning facts that affect the application of the [law]." *Ante*, at 17. Indeed, the majority's approach would appear to classify as "executive" some of the most traditional duties of the Comptroller General, such as approving expenditure warrants, rendering conclusive decisions on the legality of proposed agency disbursements, and settling financial claims by and against the Government. See 31 U. S. C. §§ 3323, 3526–3529, 3702; F. Mosher, A Tale of Two Agencies 159–160 (1984). All three of these functions were given to the Comptroller General when the position was created in 1921. See 42 Stat. 20, 24–25.

I do not understand the majority's assertion that invalidating the 1921 removal provision might make the Comptroller General "subservient to the Executive Branch." *Ante*, at 18. The majority does not suggest that an official who exercises the functions that the Deficit Control Act vests in the Comptroller General must be removable by the President at will. Perhaps the President possesses inherent constitutional authority to remove "executive" officials for such politically neutral grounds as inefficiency or neglect of duty, but if so—and I am not convinced of it—I do not see how that power would be enhanced by nullification of a statutory provision giving similar authority to Congress. In any event, I agree with JUSTICE WHITE and JUSTICE STEVENS that the power to remove an officer for reasons of this kind cannot realistically be expected to make an officer "subservient" in any meaningful sense to the removing authority. Cf. *Humphrey's Executor* v. *United States*, 295 U. S. 602, 629 (1935).

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

June 3, 1986

To: [illegible] Counsel [illegible]
[illegible]

From: American Law Division

Subject: Impact of Supreme Court Decision in Bowsher v. Synar on Functions of General Accounting Office

The District Court in Synar v. United States, 626 F.Supp. 1374 (D.D.C. 1986), prob. juris. noted sub nom., Bowsher v. Synar, Nos. 85-1377, 85-1378, 85-1379, 54 USLW 3561 (1986), held that the powers vested in the Comptroller General by the Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings Act) could not be given to an officer, such as the Comptroller General, who is removable by Congress. 626 F.Supp. at 1399-1403. This memorandum will analyze the possible impact of a Supreme Court decision affirming the lower court on the major responsibilities of the Comptroller General and the General Accounting Office.

Initially, it is hazardous to venture a guess as to how the Supreme Court might rule in Bowsher. For instance, it could hold that the delegation of authority in the Act is unconstitutional either because it is too broad and unaccompanied by sufficient standards to guide the administering officers or because Congress may not delegate such core powers. The presence of the Comptroller General as the recipient of the delegated powers would make no difference if the Court decided the case on those grounds. The District Court rejected these various delegation arguments. 626 F.Supp. at 1382-1391.

If the Court affirms both the holding and reasoning of the lower court and views the removal provision as disabling the Comptroller General from performing the type of functions delegated in the Gramm-Rudman-Hollings Act a number of the current functions of the Comptroller General would arguably be subject to similar constitutional challenge.[1] The District Court held that the calculation of the expected deficit and the specification of budget items to be reduced and the fact that such determinations are made binding on the President rendered those functions "executive powers in the constitutional sense," and therefore not exercisable by an officer removable by Congress. 626 F.Supp. at 1400. The Comptroller General currently performs many functions in the area of audit and expenditure of government funds that involve making determinations that are binding on the executive branch. Among the major such responsibilities are:

- settles and adjusts the government's accounts and may disallow payments and hold officers liable for improper expenditures. 31 U.S.C. 3526.
- settles and adjusts claims by or against the United States. 31 U.S.C. 3702.
- countersigns warrants that officially initiate recording of appropriations on the Treasury's books. 31 U.S.C. 3324.
- may waive certain claims and relieve accountable officers from liability for losses. 31 U.S.C. 3527; 5 U.S.C. 5584.

---

[1] The Court could also take a more functional approach to the office and conclude that the Comptroller General was intended to be and in fact is an operative of the Congress. It could also hold that his legislative duties predominate over his execuitve functions thereby placing him in the legislative branch and disabling him from performing the Gramm-Rudman-Hollings functions. Either holding would not require a focus on the validity of the removal provision but would similarly place in jeopardy the various executive powers of the Comptroller.

- renders advance decisions on the legality of expenditures at the behest of executive officers. 31 U.S.C. 3529.

- prescribes principles and standards for agency accounting. 31 U.S.C. 3511-2.

- issues regulations on agency collection of claims by the United States. 31 U.S.C. 3711.

- audits the financial transactions of executive agencies. 31 U.S.C. 3523.

- reports on impoundments not reported by the President or mischaracterized by him. 2 U.S.C. 686.

- consideration of protests from unsuccessful bidders on government contracts may stay the awarding of contract by agency. 31 U.S.C. 3553 (Supp. II 1984).[2]

The Comptroller General's functions under the Impoundment Control Act have previously been challenged by the Department of Justice. Specifically, the

---

[2] The court in Ameron v. United States Army Corps of Engineers, Nos. 85-5226, 85-5377 (3rd Cir. March 27, 1986) upheld the authority of the Comptroller General to perform these bid protest duties in the face of challenges similar to those advanced in Synar. The court viewed the powers as executive but held that they could be vested in an independent officer such as the Comptroller General. The Comptroller General was held by the majority to be an "independent official with duties involving both the legislative and executive branches of the United States Government." Slip Op. at 4. The General Accounting Office was held to be a hybrid agency and the majority in Ameron did not view the power of removal as rendering the Comptroller General an agent of Congress. Slip Op. at 19-25.

The concurring judge in Ameron was not comfortable with the characterization of the Comptroller General as part of a "fourth branch" of government but nevertheless upheld the vesting of the bid protest functions in an entity that he viewed as being within the legislative branch. He pointed to the fact that the executive can override the Comptroller General's stay of a contract under certain circumstances, that Congress has no voice in the daily operations of the office, and that the President appoints the Comptroller General as factors mitigating the severity of legislative infringement on executive powers. Slip Op. at 44.

Department views the authority of the Comptroller General to bring suit to force the obligation of funds improperly impounded as the vesting of an executive function in a legislative officer. The case in which the challenge was mounted - Staats v. Lynn, C.A. No. 75-0551 (D.D.C. 1975) - was settled prior to court decision. It was the first - and thus far, the only - lawsuit brought by the Comptroller General under the Impoundment Control Act. Should the Court hold in Synar that the Comptroller General is a legislative officer questions similar to those raised by the Department in Staats are likely to reemerge if the Comptroller General attempts to bring suit to force obligation of impounded funds under the Act.[3] Similar questions might also be raised about the authority of the Comptroller General to change the characterization of presidential impoundment actions thereby influencing their legal effect and the nature of the congressional response to such actions. 2 U.S.C. 686.

Thus, if the Court strikes down the vesting of powers like those in the Gramm-Rudman-Hollings Act in the Comptroller General questions could be raised regarding many other powers currently exercised by the Comptroller General. Actions and determinations that are made binding on the executive branch or effect the rights and duties of third parties may be vulnerable to challenge should the Court characterize the General Accounting Office as purely a congressional entity and the Comptroller General as an agent of Congress subject to its supervision and removal.

---

[3] The Comptroller General viewed himself in Staats as operating not as an agent of Congress but instead as an officer independent of both the executive and legislative branch. Alternatively, it was argued that even if the Comptroller General was a legislative officer, vesting the power to bring a civil action against the executive did not violate separation of powers, likening such a situation to committees or individual members suing to challenge executive actions. See, briefs filed in Staats v. Lynn, reprinted in Hearing on GAO Legislation Before the Subcomm. on Reports, Accounting, and Management of the Senate Comm. on Government Operations, 94th Cong., 1st Sess. 163-236 (1975).

The Comptroller General also performs numerous investigatory, auditing and reporting functions, functions that have been characterized as in aid of the Congress. He is empowered to investigate the use of public money, analyze agency expenditures and evaluate agency programs and activities. 31 U.S.C. 712-717. Pursuant to his various investigatory functions, the Comptroller General may subpoena records and bring a civil action to enforce access. 31 U.S.C. 716; see also, 41 U.S.C. 53 (inspection of plants and records of defense contractors to enforce anti-kickback laws). The Comptroller General has been vested with numerous other specific auditing and investigatory functions. See, General Accounting Office, Office of the General Counsel, Legislation Relating to the General Accounting Office (January 1975); Synar v. United States, 626 F.Supp. at 1399 n. 29; United States ex rel.Brookfield Construction Co. v. Stewart, 234 F.Supp. 94, 99 (D.D.C.), aff'd, 339 F.2d 753 (D.C. Cir. 1964).

Purely investigatory and fact-finding functions of the Comptroller General would seem to survive any court holding that the office is a legislative entity since these are the type of functions that Congress or its committees could perform themselves. See, Buckley v. Valeo, 424 U.S. 1, 137 (1976). However, should the Court reverse the lower court and hold that the Comptroller General is an executive officer, questions could be raised regarding parts of some of these provisions authorizing investigations and evaluations by the Comptroller General. Congress may, of course, authorize or direct by statute that an executive agency investigate and report to Congress on particular matters. The law contains hundreds of such reporting requirements. However, the Comptroller General is directed to investigate or conduct studies and evaluations not only on his own initiative but also at the request of either House of Congress or a committee. See, 31 U.S.C. 712, 717. INS v. Chadha, 462 U.S. 919 (1983), striking down the legislative veto, teaches that in order to effect the rights, duties and obligations of parties outside the legislative sphere, including executive officers, Congress must act by statute and not by the action of one House or both Houses alone or a committee. Whether empowering one House or committee to direct an executive official to take certain investigatory actions rises to the level of an unconstitutional legislative veto is a question that could be posed if the Supreme Court characterizes the Comptroller General as an executive officer.[4]

Thus, the Supreme Court's decision in Synar may have an impact on the current functions of the Comptroller General regardless of the Court's ultimate characterization of the office as either executive or legislative. The Court's decision may force a reevaluation of the role of the Comptroller General and the nature and scope of his duties.

Richard Ehlke
Specialist in American
Public Law
June 3, 1986

---

[4] The Department of Justice apparently views laws that enable one House or committee, on an ad hoc basis, to direct an agency to investigate a particular matter as legislative vetoes. See, Office of Legal Counsel, Compilation of Currently Effective Statutes that Contain Legislative Veto Provisions (July 15, 1983), reprinted in Hearings on the Supreme Court Decision in INS v. Chadha and its Implications for Congressional Oversight and Agency Rulemaking Before the Subcomm. on Administrative Law and Governmental Relations of the House Judiciary Comm., 98th Cong., 1st Sess. 23, 54 (1983)(noting 16 U.S.C. 1009).